**UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT**

UNITED STATES of America, Plaintiff-Appellant,

v.

Emile FORT, aka Twin; Edgar Diaz, aka Hook; Robert Calloway, aka Papa, Defendants-Appellees

v.

Emile Fort, aka Twin; Edgar Diaz, aka Hook, Defendants-Appellants.

Nos. 06-10473, 06-10478

March 8, 2007

Before SUSAN P. GRABER, WILLIAM A. FLETCHER, and RICHARD C. TALLMAN, Circuit Judges.

ORDER

Judges Graber and Tallman voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge W. Fletcher voted to grant the petitions.

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. On such vote, a majority of the nonrecused active judges failed to vote in favor of en banc rehearing.

The petition for panel rehearing and petition for rehearing en banc are DENIED. Judge Wardlaw's dissent from denial of en banc rehearing, and Judge Graber's concurrence in denial of en banc rehearing, are filed concurrently herewith.

GRABER, Circuit Judge, with whom TALLMAN, Circuit Judge, joins, concurring in the denial of rehearing en banc:

I write to concur in the order denying rehearing en banc, *see, e.g.*, *Defenders of Wildlife v. EPA*, 450 F.3d 394, 402-06 (9th Cir. 2006), with the limited purpose of addressing two material misunderstandings of the holding in *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007), expressed in Judge Wardlaw's dissent from the order.

1. The most important clarification relates to the interaction between *Fort* and a prosecutor's duties to disclose exculpatory materials pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The sole question presented here was whether *inculpatory* (non-*Brady*), non-public investigative reports made by local police and then turned over to federal prosecutors for use in a federal prosecution concerning the same acts of the same persons are or are not exempted from disclosure by Federal Rule of Criminal Procedure 16(a)(2). The majority held that such materials are exempted from disclosure by Rule 16(a)(2). The parties did not raise an issue about, and we did not rule on, the scope or application of *Brady* disclosure requirements. Indeed, that issue was not ripe for review in this interlocutory appeal because the deadline set for production of *Brady* materials in advance of trial had not yet been reached.

2. The dissent predicts dire consequences for the criminal discovery process. Dissent 2656-58. Ironically, Judge Wardlaw concentrates most of her attention on a prediction that *Fort* will vastly expand the kinds of materials that the federal government will have to produce during discovery. Dissent 2656-59. These concerns hinge on a second key misunderstanding.

The dissent draws an incorrect parallel between the discovery obligations imposed on the government by Federal

Rule of Criminal Procedure 16(a)(1)(E) and the discovery exemption provided by Rule 16(a)(1). For the purposes of Rule 16(a)(1)(E), this court has held, "[t]he prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any *federal agency* participating in the same investigation of the defendant." *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (emphasis added). The majority opinion does not deem the prosecution to have knowledge of or access to anything generated by a state or local actor that is not *actually* known by and in the possession of the prosecutor. In other words, unlike *Bryan*, *Fort* establishes no principle of constructive possession. *Fort* holds only that evidence gathered by state and local actors becomes subject to the disclosure obligation established by Rule 16 when it passes into federal possession for the purposes of a federal prosecution of the same defendants for the same acts that were initially subject to the state or local investigation; specifically, in this case, those acts are alleged to establish a pattern of racketeering activity in a prosecution under 18 U.S.C. § 1962. *See United States v. Gatto*, 763 F.2d 1040, 1049 (9th Cir. 1985). Therefore, the opinion's conclusion that "investigative reports created by state police officers and *turned over to federal prosecutors* to support a unified federal prosecution of defendants [are] reports 'made by an . . . other government agent in connection with investigating or prosecuting the case,'" *Fort*, 472 F.3d at 1118 (emphasis added), is both limited in scope and consistent with the prior precedent of this court.

In short, the local police reports generated by their criminal investigations are treated the same as if they were any other report of investigation with which federal courts are more familiar, such as a DEA Form 6 or an FBI Form 302 compiled in an identical federal criminal investigation. That symmetrical treatment is the key to our analysis interpreting a federal prosecutor's discovery obligations under Rule 16 and the Jencks Act.

WARDLAW, Circuit Judge, with whom PREGERSON, REINHARDT, W. FLETCHER, FISHER and PAEZ, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I respectfully must note my strong disagreement with my colleagues who voted against rehearing this appeal en banc. The issue is one of exceptional importance to the administration of justice in criminal proceedings: the scope of the work product privilege in criminal discovery.[1] The panel majority ignores the plain meaning of the Federal Rules of Criminal Procedure, as Judge W. Fletcher ably details in his dissenting opinion. *United States v. Fort*, 472 F.3d 1106, 1122-31(9th Cir. 2007). Its interpretation of Rule 16 significantly alters the landscape of criminal discovery. In the course of its interpretative voyage, the panel majority works two sea-changes in existing law. First, it fashions from whole cloth a retroactive theory of agency between local and federal officials. Second, its holding as to the scope of the work product privilege directly conflicts with Supreme Court precedent, circuit court precedent, and the way prosecutors, defenders and district courts apply Rule 16 on a daily basis. The panel majority's opinion threatens to reduce prosecutorial transparency in criminal prosecutions, provides tools for discovery gamesmanship, unwittingly hampers prosecutors by creating traps for reversible *Brady* error, and increases the costs and burdens on criminal defendants, much of which is born by the federal government. The panel majority's opinion also has far-reaching effects, touching a vast number of criminal prosecutions in the Ninth Circuit. This is exactly the type of exceptional case that warrants rehearing en banc.

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[1] Nine Federal Public Defenders representing the Central, Eastern, and Northern Districts of California, the District of Montana, the District of Nevada, the Eastern and Western Districts of Washington, the District of Idaho, the District of Guam, and the District of Oregon jointly filed an amicus brief in favor of rehearing en banc, citing the effect of the panel majority's opinion on a significant percentage of all pending and future criminal prosecutions in the Ninth Circuit.

I. Background

This interlocutory appeal arises from a federal racketeering and drug conspiracy prosecution of some alleged members of the "Down Below Gang," which operates in public housing projects in San Francisco. The eighty-six count second superseding indictment, which includes one hundred and three predicate acts as part of the racketeering and drug conspiracies, names eleven defendants. Eight defendants entered plea agreements following the issuance of the panel majority's original unreasoned order that vacated the district court's discovery rulings. The government has filed notices of intent to seek the death penalty against defendants Emile Fort and Edgar Diaz.

The predicate acts were investigated by local police authorities for years before there was ever any federal involvement. As a result, there are thousands of pages of local police reports critical to both the prosecution and defense of the case. The Down Below Gang, like many violent criminal organizations, has a documented history of using violence and intimidation to thwart investigators and prosecutors. Citing witness protection concerns, federal prosecutors have steadfastly refused to turn over unredacted versions of the local police documents in their possession. The redactions in those documents include witness names and both inculpatory and exculpatory evidence. [2]

The district court found that the local police reports were "material to preparing the defense," under Federal Rule

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[2] The panel majority insists that the documents include no exculpatory information. This is simply not true. As District Court Judge Alsup noted in one of his discovery orders in this case, "[T]he names of all witnesses . . . have been redacted [by the prosecutors]-even as to witnesses wholly or largely exculpatory to one or more defendants." *See United States v. Diaz*, No. 05-0167 (N.D.Cal. May 18, 2006) (Order re Discoverability of Local Police Reports under Rule 16 and Schedule for Further Submissions) (Docket No. 367) at 1.

of Criminal Procedure 16(a)(1)(E), and ordered the prosecutors to turn the reports over in unredacted form. However, to ensure witness safety, using its authority under Rule 16(d), the district court limited disclosure of the documents, fashioning a nuanced and thorough protective order. Nevertheless, prosecutors adamantly refused to produce the local police reports, asserting the work product protections of Rule 16(a)(2). [3] The district court unsurprisingly held that the Rule 16(a)(2) privilege applies only to documents made by agents of the federal government in connection with investigating or prosecuting the case. The district court further deemed local police officers, *who at the time of the investigation of the case* were working with federal investigators, federal "agents" for the purposes of the Rule 16(a)(2) privilege. However, such a joint-investigation showing, which would have justified the claim of privilege, was never made by the federal prosecutors. The district court therefore ordered evidentiary sanctions against the prosecutors for flouting its discovery holdings, and the government appealed.

II. Criminal Discovery

"There is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). Over time a patchwork of statutory and judge-made rules has evolved to govern criminal discovery. Those rules include: (1) the Jencks Act;[4] (2) the Federal Rules of Criminal Procedure; and (3) *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

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[3] Witness protection was the government's primary justification for its recalcitrant conduct; it is unclear why, for non-testifying civilians, the government did not simply assert its privilege under *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

[4] The Jencks Act requires prosecutors to turn over to the defense statements made by testifying witnesses if those statements are in the prosecutor's possession. *See* 18 U.S.C. § 3500; Fed R.Crim. P. 26.2; *United States v. Polizzi*, 801 F.2d 1543, 1552 (9th Cir.1986).

i. The Rules of Criminal Procedure

Rule 16 of the Federal Rules of Criminal Procedure governs criminal discovery. It has been significantly expanded since the Rules were first adopted, and it now imposes discovery obligations both on the government and the defense. *See* Fed.R.Crim.P. 16 (1966 Amendment); *id.* (1974 Amendment); *id.* (1975 Enactment). Unlike civil discovery, where some materials are automatically produced as a matter of right, in criminal discovery, the defendant must invoke the right to discovery. *Compare* Fed.R.Crim.P. 16(a)(1) *with* Fed.R.Civ.P. 26(a). Once a defendant makes a Rule 16 discovery request and the government complies, the government is entitled to seek reciprocal discovery from the defendant. *See* Fed.R.Crim.P. 16(b)(1). Work product of the United States and of the defense are not subject to discovery under Rule 16. *See* Fed.R.Crim.P. 16(a)(2), 16(b)(2).

Among the items that the government must produce upon request are:

> Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
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> (i) the item is material to preparing the defense;
> (ii) the government intends to use the item in its case-in-chief at trial; or
> (iii) the item was obtained from or belongs to the defendant.

Fed.R.Crim.P. 16(a)(1)(E). In the Ninth Circuit, federal prosecutors are deemed to have "possession and control" over material in the possession of other federal agencies as long as they have "knowledge" of and "access" to that

material. *United States v. Santiago*, 46 F.3d 885, 893 (9th Cir.1995). Thus, for the purposes of Rule 16, possession can be imputed to federal prosecutors even if they do not physically possess the materials.

ii. *Brady*

Though not technically a rule of criminal discovery, *Brady* and its progeny play an important role in the process. Discovery decisions made by prosecutors must always be made with one eye on successful prosecution and the other on the potential for reversible error for failure to disclose information. *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). The prosecutor's duty to disclose information includes a duty to disclose information known to other agents of the government. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (citing Restatement (Second) of Agency, and noting that prosecutors speak for the government as a whole). This principle was reiterated in the context of a state court prosecution in *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (imputing knowledge of state police investigators to the prosecutor). "[E]vidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Strickler v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

* * *

Rule 16 is in essence a procedural prophylactic for *Brady* error. "Generally, *Brady* violations first come before a court after the trial and the court may then consider the

materiality of what was suppressed or omitted from disclosures made, in the context of the complete trial record. Indeed, it is not possible to apply the materiality standard in *Kyles* before the outcome of the trial is known." *United States v. McVeigh*, 954 F.Supp. 1441, 1449-50 (D. Colo. 1997).[5] The panel majority's opinion and its impact must be evaluated through the *Brady* /Rule 16 lens.

III. Panel Majority's Decision

There is no dispute that the local police reports at issue qualify under Rule 16(a)(1)(E) as documents "material to preparing the defense." Thus, the only question before the panel was whether the local police reports qualified as privileged work product. This required the panel to interpret Rule 16(a)(2):

> Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Fed.R.Crim.P. 16(a)(2). "The meaning of Rule 16(a)(2) is so plain that it should be unnecessary to do anything more than simply read the text in order to conclude that it does not protect documents prepared by the San Francisco Police Department without any involvement by the federal

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[5] The interplay between these rules is thoughtfully explored by Judge Matsch in his discovery order from the capital trial of Timothy McVeigh.

government." *Fort*, 472 F.3d at 1124 (W. Fletcher, J., dissenting).

Nonetheless, the panel majority dissected the language of Rule 16 and imbued it with new meaning. The panel majority first concluded that the word "government" refers to the federal government. *Id.* at 1111. It then concluded that the term "'government agent' includes non-federal personnel whose work contributes to a federal criminal 'case.'" *Id.* at 1113. Finally, it held that the phrase "in connection with investigating or prosecuting the case," is so broad as to include any such work by any "government agent," at any time, even before there is a federal case. *Id.* at 1119-20. This combination of rulings transforms local police officers involved in local investigations years before any federal prosecution was even contemplated into federal "government agents." *Id.* As a result, all "reports, memoranda, or other internal government documents" generated by the San Francisco Police Department while investigating the Down Below Gang magically became material *not subject to discovery under Rule 16 at all.* [6]

IV. Consequences

In bypassing the plain meaning of Rule 16(a)(2), the panel majority ignored well-established canons of statutory construction, relied on inapposite cases and commentaries, and failed to consider the far-reaching consequences of its ruling, especially its redefinition of agency. Judge W. Fletcher's dissent expertly provides a proper textual analysis of Rule 16, *id.* at 1123-26, and explains the fallacies in the panel majority's reasoning, *id.* at 1126-31. That said, we do not rehear en banc every appeal where the panel gets it wrong. *See* Fed. R.App. P. 35(a) (limiting en banc rehearing

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[6] There is no criminal discovery analog to the "substantial need" safety valve to compel discovery of "fact work product." *See* Fed. R. Civ. P. 26(b)(3). In the absence of a Jencks Act or *Brady* compulsion to divulge such materials, the only way a defendant can acquire them is through prosecutorial largesse.

to "question[s] of exceptional importance" and conflicts with Supreme Court or existing Ninth Circuit precedent). There are numerous reasons that this appeal meets these criteria and should have been reheard en banc.

i. Work Product Rule

One of the major justifications underpinning the panel majority's expansion of the scope of Rule 16(a)(2) is that the rule was intended "to be a rule of discovery, related to the work product doctrine but not synonymous or coextensive with it." *Fort*, 472 F.3d at 1116. The panel majority's novel assertion that Rule 16(a)(2) is not a work product exception is directly contrary to the way that Rule 16 has consistently been interpreted by federal courts. In *United States v. Armstrong*, 517 U.S. 456, 463, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), the Supreme Court noted that "under Rule 16(a)(2), [a defendant] may not examine Government work product in connection with his case." *See United States v. Nobles*, 422 U.S. 225, 239 & n. 13, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (describing Rule 16(a)(2) as embodying the work product exception). That Rule 16(a)(2) is a work product exception has been reiterated by our and other courts of appeal. *See, e.g., Virgin Islands v. Fahie*, 419 F.3d 249, 257 (3d Cir. 2005) ("The exception in Rule 16(a)(2) applies to work product. The ATF Report was not government work product of a type exempted from discovery. It did not contain mental impressions, conclusions, opinions or legal theories concerning litigation of an attorney or other representative of a party.") (citations and quotations omitted); *United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000) ("Rule 16 of the Federal Rules of Criminal Procedure recognizes the work product privilege.").

ii. Vast Expansion of Government Agency

The panel majority relies on its mistaken notion that physical possession of materials by the federal government is

the touchstone of discoverability analysis under Rule 16. *Fort*, 472 F.3d at 1118-19 (discussing *United States v. Gatto*, 763 F.2d 1040 (9th Cir. 1985)). Our law is to the contrary. We have held that "[t]he prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (discussing Rule 16(a)(1)(C), which has since been moved to Rule 16(a)(1)(E)); *see also Santiago*, 46 F.3d at 895.[7] Rule 16 discoverability analysis thus hinges on federal government agency, not on federal government possession. If local authorities are "government agents" for the purposes of 16(a)(2) privilege, then they must also be government agents for the purposes of 16(a)(1) production. The panel majority's broad expansion of "government agents" portends a number of deleterious downstream effects.

1. Expanded Prosecution Claims of Privilege

Here, the documents at issue are local police reports. But, the panel majority does not draw any lines as to the type of state or local agency that may be deemed an after-the-fact agent of the federal government under Rule 16. So, depending on the prosecution, its holding readily embraces reports made by state environmental or business regulation bodies long before a prosecution is even contemplated by the federal government.[8] Those reports need not contain any mental impressions particularly geared towards federal prosecution of a particular case under the panel majority's rule, but rather must simply be made "in connection with

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[7] The panel majority's focus on physical possession is misguided, and even if it were correct, would lead to the bizarre result that the local police reports become privileged work product only if they are physically handed to federal prosecutors, but remain unprivileged if they are not.

[8] There is no reason under the panel majority's opinion that agents of another sovereign, such as Mexico or Canada, could not also retroactively become federal agents for the purpose of invoking the work product privilege.

investigating or prosecuting the case." This means that many documents that were previously discoverable by the defense can now be flagged as privileged work product.

2. Defense Claims of Privilege

What's sauce for the goose is sauce for the gander. Put another way, the panel majority's opinion means that a defendant may invoke the retroactive agency holding to make any individual who has material relevant to the defense case an after-the-fact agent, and similarly lock up "reports, memoranda, or other documents made by . . . the defendant's . . . agent, during the case's investigation or defense" as privileged work product under Rule 16(b)(2). The symmetrical structure of Rules 16(a) and 16(b) demands that the panel majority's novel interpretation of agency applies for defendants as well as for the government. This will lead to broad invocations of privilege designed by defendants to thwart criminal prosecution by locking up as much potentially relevant material as possible.

3. *Brady* Implications

The panel majority asserts that "nothing in this opinion should be interpreted to diminish or dilute the government's *Brady* obligations." *Fort*, 472 F.3d at 1110. Indeed, the panel majority's opinion has the exact opposite effect: it enhances the scope of the federal government's *Brady* obligations. The extension of *Brady* to knowledge not personally held by the prosecutor has been driven by theories of government agency. *See Giglio*, 405 U.S. at 154, 92 S.Ct. 763 (applying agency principles to prosecutors as spokesmen for the federal government). As noted previously, Rule 16 and *Brady* are in many ways two sides of the same coin. If a local agency is a "government agent" for Rule 16 purposes, it should also be deemed an agent for *Brady* purposes. This extends the federal government's *Brady* duties to include information in the control of local agencies that participated in the "case."

And, in turn, the scope of the prosecutor's policing responsibilities with respect to their non-federal information sources is now greatly extended. While the DOJ likely has internal "procedures and regulations . . . to carry that [*Brady*] burden and to insure communication of all relevant information [held by DOJ appendages] on each case to every lawyer who deals with it," *Giglio*, 405 U.S. at 154, 92 S.Ct. 763, it seems unlikely that any prosecutor would want the additional duty of ferreting out any and all relevant *Brady* material from every state or local (or foreign) agency that provides investigative material to the federal government. The panel majority's opinion expands the government's *Brady* obligations into a space where even the best-intentioned prosecutor will never be able to comply.

4. Conflicting Doctrines of Agency

The conduct of federal agents is constrained by laws and rules that do not apply to local officials or private parties. To ensure that federal agents cannot avoid those rules by using straw men, we have applied agency concepts to extend their applicability. For example, Federal Rule of Criminal Procedure 41 governs search and seizure by federal agents, and imposes various restrictions related to warrants. We have extended the strictures of Rule 41 to local officials only when they perform a search that is "federal in character," that is, "from the beginning it was assumed a federal prosecution would result." *United States v. Palmer*, 3 F.3d 300, 303(9th Cir. 1993). This interpretation of who is a federal agent sensibly takes into consideration the temporal aspect of the relation between the investigating official and the prosecution. Thus, only if there is some reason *at the time of the search* to deem it a federal search does Rule 41 apply to searches performed by local officials.

The panel majority's definition of a "government agent" ignores examples like Rule 41 and runs roughshod over the traditional tenet of agency that a principal-agent relationship must exist at the time of the agent's actions in

order to ascribe culpability to the principal. *See, e.g., United States v. Veatch*, 674 F.2d 1217, 1221-22 (9th Cir. 1981) ("A private person cannot act unilaterally as an agent or instrument of the state; there must be some degree of governmental knowledge and acquiescence. In the absence of such official involvement, a search is not governmental.") (quoting *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir.1976) (en banc)); *United States v. Birnstihl*, 441 F.2d 368, 370 (9th Cir.1971) (per curiam) (holding that no *Miranda* warnings were required because "[t]he evidence was completely inadequate from which to conclude that the [private security] guard in this case was an actual or ostensible agent of the police"); *see also United States v. Jones*, 231 F.3d 508, 517 (9th Cir. 2000) ("A person is a government agent when the government authorizes, directs and supervises that person's activities and is aware of those activities.") (quotation and citations omitted).

iii. Practical Concerns

1. Encouraging Gamesmanship

Rule 16 prevents criminal trials from becoming "a sporting contest in which the game of cat and mouse is acceptable." *United States v. Howell*, 231 F.3d 615, 626 (9th Cir. 2000); *see also Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) ("The United States Attorney['s] . . . interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). When defendants invoke Rule 16, they open themselves up to discovery to gain access to information held by the government; thus, they invariably give the government some inkling of the defense theory of the case. Through this process, prosecutors become more informed about their own case and the evidence in their possession. This interplay during criminal discovery also often causes prosecutors to reevaluate the possible *Brady* relevance of material. In a criminal prosecution like this, where there are thousands of pages of local police documents, it is even more likely that

prosecutors will be unaware of the potential importance of materials that they, or the local police, may possess. The panel majority drives a significant wedge into the discovery process. First, the defense is unlikely to even ask for discovery if the government is entitled to the broad privilege created by the majority. If the government is aggressive in labeling material "privileged," little material of any use to the defense is likely to be turned over in any event. Second, even if the defense does participate, it will now be able to assert a similar privilege for materials garnered from "agents."

As a practical matter, in a complex case, it is impossible for prosecutors to mentally catalog everything in their possession and predict how its *Brady* relevance may be affected by the defense presented at trial. For example, each of the one hundred and three predicate acts for just two of the eighty six counts in the indictment is presumably supported by a variety of witnesses, physical evidence, and other material, as well as police reports and investigatory documents prepared by the local police. Without some back and forth with the defense, the prosecution will not even know where to look for *Brady* material. As a result, avoiding *Brady* error will depend solely on prosecutorial epiphany when the defense puts on its case.[9]

This is a recipe for mistrial or reversal on appeal – a result that delays justice, and wastes prosecutorial resources, judicial resources, and jury time, particularly in complex criminal cases (the very cases most affected by the panel majority's opinion). These expanded *Brady* obligations exacerbate the potential for error, since federal prosecutors must also disclose *Brady* material in the possession of local authorities now deemed "government agents."

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[9] This is invariably true for some *Brady* material related to wholly unanticipated defense theories, but typically *Brady* material will be found before trial if there is meaningful discovery.

2. Stripping Case Management Power from District Courts

Rule 16(d) gives district courts the authority to control criminal discovery and to enter protective orders as needed. That is precisely what the able and experienced district court judge sought to do here. That power has proven adequate to allow for the fair trial in this circuit of members of other organizations that may have threatened witness safety, including violent criminal gangs such as the Aryan Brotherhood and the Mexican Mafia. But here, the government refused to cooperate on the novel and incorrect theory of privilege now endorsed by the panel majority. This is a classic example of over-aggressive prosecutors seeking a short-term advantage without fully contemplating the potential negative impact on the success of their own future prosecutions.[10] The majority opinion whisks away from the district court the discretion to decide what material is important to a fair trial and vests it in the prosecution. In this case, the panel majority's intervention halted a complex criminal trial in its tracks and thwarted the ability of the trial court to manage its own trial.

3. Broad Impact

The panel majority's opinion will affect a sizeable number of criminal defendants in this circuit. For most judicial districts in the Ninth Circuit, between thirty and sixty percent of criminal prosecutions assigned to the Federal Public Defender's office originated with or involve local law

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[10] The district court made a number of highly critical findings about the conduct of the prosecutors, which the panel majority fails to address. *See United States v. Diaz*, No. 05-0167 (N.D. Cal. July 20, 2006) (Testimony-Preclusion Order as Sanction for Noncompliance with Rule 16 Order) (Docket No. 578) at 6 ("[D]efense counsel still remain in the dark-*and are intended by the government to remain in the dark*-as to the source of the potential evidence.") (emphasis in original); *id.* at 12 ("Despite the Court's considerable respect for government counsel herein, this order must find that they have acted willfully to abridge Rule 16 rights to gain trial advantage over the defense.").

enforcement.[11] In those cases, federal prosecutors can now assert a work product privilege over any and all investigatory materials acquired from local authorities and refuse to turn them over to the defense. This will force defense counsel to dedicate more resources to tracking down that information through means other than Rule 16. Ultimately, the increased time and effort spent in criminal discovery will affect the quality and cost of criminal defense. The effectiveness of defense counsel will be decreased by the reduced access to information. Costs under the Criminal Justice Act, paid from the public treasury, will increase as counsel are forced to pursue other avenues to acquire material already in the hands of prosecutors.

V. Conclusion

In addition to deciding an exceptionally important issue in a way that directly conflicts with every controlling authority, the panel majority's opinion is just plain wrong. It gets the textual interpretation wrong. It gets the policy analysis wrong. It deviates from Supreme Court and circuit law on agency and work product privilege. It hamstrings district court judges. It condones trial by ambush in a capital case. It increases the costs of defending and trying complex criminal cases. It hurts the prosecution, the defense, and the quest for truth. For those reasons this appeal merited rehearing by our en banc court and an ultimate ruling that affirms the district court.

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[11] This estimate of potential cases affected throughout the Ninth Circuit is set forth in the Federal Public and Community Defenders's amicus brief in support of rehearing en banc.

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Argued and Submitted Oct. 19, 2006.
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Before GRABER, W. FLETCHER, and TALLMAN, Circuit Judges.

GRABER, Circuit Judge.

The federal criminal prosecution of Defendants Emile Fort, Edgar Diaz, and Robert Calloway for racketeering and various predicate crimes is pending trial. Defendants are alleged to be members of the "Down Below Gang," a San Francisco-based street gang operating in the Sunnydale Public Housing Project. They stand accused of engaging in an illegal enterprise of individuals associated in fact, who dealt drugs, committed robberies, and assaulted and killed those they believed were cooperating with the police. The witnesses who are expected to testify for the United States are primarily residents of the housing project, and the district

court has found "that the government has made a substantial showing of danger to inculpatory witnesses."

The United States brings this interlocutory appeal to challenge a discovery order issued by the district court ("June 16 Order"). The June 16 Order ruled that police reports created by San Francisco police officers prior to the federal prosecution of Defendants do *not* qualify for the discovery exception created by Federal Rule of Criminal Procedure 16(a)(2), even though those investigative reports are in the hands of the federal prosecutor for the purpose of pursuing charges against Defendants under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. The government refused to comply with the discovery order, and the district court sanctioned the noncompliance. On appeal, the government seeks review of the sanction and of the district court's underlying decision regarding the scope of Rule 16(a)(2). Defendants Fort and Diaz cross-appeal the sanction order and seek additional sanctions against the government.

We hold that the documents in dispute are not discoverable because they are covered by Federal Rule of Criminal Procedure 16(a)(2) whether prepared by federal, state, or local officials. Accordingly, we vacate the June 16 Order and do not reach the merits of the government's challenge to the sanction imposed. We do not have jurisdiction over Defendants' cross-appeal.

In addition, the government petitions for a writ of mandamus to reverse a separate order ("August 26 Order") of the district court. The August 26 Order requires the government to produce a list of witnesses to Defendants 21 days before trial, pursuant to 18 U.S.C. § 3432. The government submitted a notice of noncompliance to the district court but has not yet violated the order nor been sanctioned. For the reasons that we explain below, we remand the August 26 Order without ruling on the mandamus petition.

FACTUAL AND PROCEDURAL BACKGROUND

A grand jury returned an 86-count second superseding indictment charging Defendants Fort, Diaz, Calloway, and several other people with racketeering crimes that include predicate acts involving drugs, firearms, murder, and attempted murder. In the course of discovery, the district court issued a number of orders compelling the government to turn over witness information to the defendants. Defendants Fort, Diaz, and Calloway are the only three defendants who are involved in this appeal.

A. *Rule 16 Orders*

The first set of orders at issue here relates to inculpatory police reports created by the San Francisco Police Department prior to the initiation of the federal prosecution of Defendants. The government disclosed many thousands of pages of these reports to Defendants during discovery but redacted all witness names and locator information.

The district court issued a series of orders relating to the discoverability of the police reports. The first order, dated May 18, 2006, held that all investigative reports created by the San Francisco police that are "in the possession, custody or control" of the United States Attorney's Office are "documents" subject to discovery within the meaning of Federal Rule of Criminal Procedure 16(a)(1)(E). It further held that a report is exempt from discovery under the provisions of Rule 16(a)(2) "only if the report was prepared in connection with investigating or prosecuting the subject case by police officers having a relationship to the federal prosecutors substantially equivalent to that of federal investigative agents." The court invited the government to demonstrate that the reports were so prepared. The government made no such showing.

The district court finalized its discovery ruling with regard to the police reports in its June 16 Order. It held that "all of the local police reports related to this case in the possession of the United States Attorney's Office are producible under Rule 16 and are not within the work-product exemption to Rule 16(a)(2)." The district court also made two alternative rulings relating to waiver. First, it held that any Rule 16(a)(2) protection that may have attached to the police reports was waived by the government when it voluntarily and intentionally produced portions of the reports to Defendants. Second, it held that the government further waived any Rule 16 protection with regard to a number of the police reports by allowing a witness for the government who is an expert on gang crimes to rely on the reports in forming his conclusions. The June 16 Order directed the government to allow Defendants access to the information redacted from the police reports pursuant to the terms of an accompanying Protective Order for Witness Security ("Protective Order") and memorandum opinion, also issued on June 16, 2006.

The district court devised the Protective Order without the government's cooperation. In its related memorandum opinion, the court found that the government had made a substantial showing of serious physical danger to inculpatory witnesses. In its view, the terms of the Protective Order would improve, rather than impede, the witnesses' security. The Protective Order contained extensive regulation of the discovery and use of protected information.

The government promptly filed a notice of noncompliance with regard to the Protective Order. The district court issued a sanction order on July 20, 2006, that precludes the government from using against Defendants the testimony of any inculpatory civilian witness whose name was redacted from discoverable materials, unless the government demonstrates that the refusal to allow access was substantially harmless.

The government appealed both the Rule 16 ruling and July 20, 2006, sanction order. Defendants Fort and Diaz filed a cross-appeal challenging the sanction order, arguing that the district court should, additionally, preclude the government from seeking the death penalty against them.

B. *18 U.S.C. § 3432 Order*

Before making its Rule 16 determination, the district court had issued a separate discovery order on August 26, 2005, requiring the government to disclose its witness list 21 days before trial, pursuant to 18 U.S.C. § 3432. The government submitted a notice of noncompliance to the court. The government petitions for mandamus, seeking reversal of the § 3432 discovery order. The government filed its mandamus petition more than 21 days before the date on which the trial is scheduled to commence, so at the time of the filing the government had not yet violated the discovery order and the court had not yet imposed any sanction.

STANDARD OF REVIEW

We review de novo a district court's interpretation of the Federal Rules of Criminal Procedure. *United States v. Navarro Viayra*, 365 F.3d 790, 793 (9th Cir.2004). We also review de novo questions of waiver. *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir.2003).

DISCUSSION

A. *Jurisdiction*

As a preliminary matter, Defendants argue that we lack jurisdiction to review the district court's interpretation of the scope of Rule 16. Defendants assert that, because the government appealed the July 20, 2006, sanction order, the "collateral bar" rule precludes us from reviewing the district court's underlying substantive ruling contained in the June 16 Order. That argument is foreclosed by our precedent, which

permits an appeal on the merits in this situation. *See United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir.2000) ("For while discovery orders themselves are not generally 'final' for purposes of section 1291, parties who face such an order have the option of making the decision 'final' simply by refusing to comply, and appealing the resulting sanction." (citation and internal quotation marks omitted)). We turn, therefore, to the merits of the government's appeal.

B. *Rule 16*

This appeal presents the question whether investigative reports prepared by a local police department prior to a federal prosecutor's involvement qualify for the discovery exemption created by Rule 16(a)(2) when they are turned over to the federal prosecutor for use in the federal investigation and prosecution of the same acts by the same people.[1] From the outset, it is important to note that this appeal does not involve the government's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or other disclosure rules. The identifying information here pertains to inculpatory, not exculpatory, evidence, and nothing in this opinion should be interpreted to diminish or dilute the government's *Brady* obligations. We review only the district court's determination that local police reports do not qualify for the Rule 16(a)(2) exemption and that they are, therefore, discoverable materials under Rule 16(a)(1)(E). This is an issue of first impression for our court. No constitutional or statutory provisions control the outcome, so we must begin by reviewing the text of Rule 16. *See United States v. John Doe, Inc.*, 481 U.S. 102, 109, 107 S.Ct. 1656, 95 L.Ed.2d 94

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[1] The dissent vigorously pursues a ghost when it attacks as illogical the government's witness-protection motive for pursuing this appeal. Dissent at 1122-23, 1130-31. We do not rely on the government's motive or on witness protection to interpret Rule 16(a)(2). Our interpretation of Rule 16(a)(2) applies regardless of the content of the non-disclosed inculpatory information and regardless of the potential effect of disclosure on witness safety.

(1987) (stating that an appellate court must look first to the plain meaning of the text when interpreting a Federal Rule of Criminal Procedure).

1. *Text of the Rule*

Rule 16(a)(1)(E) sets out the types of information that the government must disclose to defendants during discovery:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph ... *documents* ... if the item is within the government's *possession, custody, or control* and:
>
> > (I) the item is *material to preparing the defense;*
> >
> > (ii) the government intends to use the item in its case-in-chief at trial; or
> >
> > (iii) the item was obtained from or belongs to the defendant.

(Emphasis added.) Rule 16(a)(2) limits the scope of discoverable materials: [2]

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[2] In *United States v. Rudolph*, 224 F.R.D. 503 (N.D.Ala.2004), the district court addressed whether Rule 16(a)(2) provides an exception to the discovery requirements of Rule 16(a)(1)(E). Because Rule 16(a)(2) begins with the general statement, "Except as Rule 16(a)(1) provides otherwise," the court wrote that a plain reading of the text would lead to the conclusion that all materials meeting the parameters of Rule 16(a)(1)(E) must be produced. After a survey of the history of the rule's purpose and structural amendments, however, the court concluded that this conflict resulted from a "scrivener's error" and was not intended by the Advisory Committee or by Congress. *Id.* at 507. Neither party raises that issue here. But, for the purpose of clarity, we observe that the *Rudolph* court's analysis is persuasive, and we adhere to its reading of Rule 16(a)(2) as an exception to the discovery requirements of Rule 16(a)(1)(E).

> Except as Rule 16(a)(1) provides otherwise, *this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an* attorney for the government or *other government agent in connection with investigating or prosecuting the case.* Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.
> (Emphasis added.)

It is undisputed that the written police reports at issue here are "documents" within the "possession, custody, or control" of the federal prosecutor and that they are "material to preparing the defense." Thus, the reports are discoverable under Rule 16(a)(1)(E) unless exempted by Rule 16(a)(2). We must decide whether the reports were "made by an ... other government agent in connection with investigating or prosecuting the case." This inquiry requires us, in turn, to determine what is meant by "government agent" and "the case."

a. "*Government agent*"

The Rules do not define the phrase "other government agent." Although the constituent term "government" is not explicitly defined, it is used as shorthand for "federal government" throughout the Rules.[3] In accordance with that

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[3] *See, e.g.*, Rule 7(f) ("The court may direct the government to file a bill of particulars."); Rule 9(a) ("The court must issue a warrant-or at the government's request, a summons-for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause...."); Rule 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere...."); Rule 12(b)(4) (entitled "Notice of the Government's Intent to Use Evidence"); Rule 12(h) ("At a suppression hearing, a law enforcement officer is considered a government witness."); Rule 12.1(b) (requiring attorney for the government to disclose information for "each witness the government intends to rely on to establish the defendant's presence at the scene" and "each government rebuttal witness to the defendant's alibi defense");

construction, Rule 1(b)(1) defines restrictively the term "attorney for the government" to mean (as relevant here) a federal prosecutor.[4]

Even though "government" means "federal government" in Rule 16(a)(2), we are still left to determine who qualifies as an "agent" of the federal government in the context of the discovery process in a federal criminal prosecution. Defendants urge us to limit the concept of "government agent" to those individuals who were employed directly by the federal government or who were acting at the federal prosecutor's direction at the time that they drafted a report. In contrast, the government urges that the term "government agent" be given a broader definition that would include state or local police officers whose investigation of a defendant provides evidence to support a federal prosecution of the same defendant for the activities so investigated. Both readings are plausible, so we must look more deeply.

It is a general rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd*

Rule 12.2(c)(3) (referring to the "government's examination" of the defendant's mental competency in context of insanity defense); *see also* Rules 5(c)(3)(D)(I), 5.1(a)(3) & (4), 5.1(f), 12.3(a)(4), 12.4(a)(2), 14(a), 14(b), 15(d), 17(b), 18, 23(a)(2), 24(b)(1) & (2), 26.3, 28, 29(a), 29.1, 31(b)(3), 32.1(a)(5)(B)(I), 32.2(a), 32.2(b)(1) & (4), 32.2(e)(1) & (2), 35(b), 41(a)(2)(C), 42(a)(2), 46(f)(3)(A) & (C), 48(a).

[4] Rule 1(b)(1) provides:

> "Attorney for the government" means:
>
> (A) the Attorney General or an authorized assistant;
>
> (B) a United States attorney or an authorized assistant;
>
> (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and
>
> (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

Co., 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (internal quotation marks omitted). Accordingly, we first examine the other parts of Rule 16 for guidance. Rule 16(a)(1)(A) and (B) both refer to a "government agent." Rule 16(a)(1)(A) provides:

> Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a *government agent* if the government intends to use the statement at trial.

(Emphasis added.) [5] As is true of Rule 16(a)(2), the term "government agent" is not specifically defined in Rule 16(a)(1)(A). But Rule 16(a)(1)(A) has been read to require federal prosecutors to disclose statements made by defendants to *local* law enforcement officers so long as such statements are in the federal prosecutor's possession at the time of trial. *See United States v. Mitchell*, 613 F.2d 779, 781 (10th Cir.1980) (holding that Rule 16(a)(1)(A)'s disclosure requirement applies to a statement made by the

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[5] Rule 16(a)(1)(B) provides:

Upon a defendant's request, the government must disclose to the defendant ... all of the following:

(i) any relevant written or recorded statement by the defendant if:

the statement is within the government's possession, custody, or control; and

the attorney for the government knows-or through due diligence could know-that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a *government agent*; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(Emphasis added.)

defendant to a state probation officer); *see also United States v. Rinn*, 586 F.2d 113, 120 (9th Cir.1978) (analyzing under Rule 16(a)(1)(A) the government's failure to disclose the defendant's statement to an undercover state police officer and holding that there was no violation, but only because the defendant's statement was not in response to "interrogation"); *United States v. Cooper*, 800 F.2d 412, 416 (4th Cir.1986) (same, with regard to the defendant's incriminating statements to a D.C. corrections officer); *United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir.1997) (holding that the government did not violate Rule 16(a)(1)(A) by failing to disclose the defendant's state-court guilty pleas before trial, where it disclosed them as soon as it gained possession). We have found no contradictory construction of Rule 16(a)(1)(B).

The government's proposed reading of "government agent" is consistent, then, with decisions implementing the same phrase in Rule 16(a)(1)(A). Even so, Defendant's narrower construction is still plausible. Therefore, we look beyond Rule 16 for additional insight.

Few of the Rules address the kind of potential cooperation between federal and non-federal players raised in this appeal, so they offer little guidance in interpreting Rule 16's use of the term "government agent." *See supra* note 2. Federal Rule of Criminal Procedure 6 is one of the few Rules, other than Rule 16, that pertains to potential cooperation among federal, state, and local law enforcement.

The commentary to Rule 6 assists us in understanding the Advisory Committee's general concerns for a practical, cooperative approach.

Rule 6 governs federal grand jury proceedings. In establishing exceptions to the general rule of secrecy for grand jury proceedings, Rule 6(e)(3) allows disclosure to "any *government personnel* – including those of a state, state subdivision, Indian tribe, or foreign government-that an attorney for the government considers necessary to assist in

performing that attorney's duty to enforce criminal law." Fed.R.Crim.P. 6(e)(3)(A)(ii) (emphasis added). Thus, "government personnel" is defined expressly to incorporate not only federal authorities, but also employees of non-federal government entities that are engaged in assisting federal criminal law enforcement. In explaining the rationale for this expansive definition, the Advisory Committee described concerns equally apropos to Rule 16:

> It is clearly desirable that federal and state authorities cooperate, as they often do, in organized crime and racketeering investigations, in public corruption and major fraud cases, and in various other situations where federal and state criminal jurisdictions overlap. Because of such cooperation, government attorneys in complex grand jury investigations frequently find it necessary to enlist the help of a team of government agents. While the agents are usually federal personnel, it is not uncommon in certain types of investigations that federal prosecutors wish to obtain the assistance of state law enforcement personnel, which could be uniquely beneficial. The amendment permits disclosure to those personnel in the circumstances stated.

Fed.R.Crim.P. 6(e)(3)(A)(ii) (1985 amendments) advisory committee's note.

Although the Advisory Committee has not amended Rule 16 to include a similar (or, indeed, any) express definition of "government agent," Rule 16 has not been subject to the type of conflict among district courts that prompted the Advisory Committee to amend Rule 6.[6] The

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[6] *See* Rule 6(e)(3)(A)(ii) (1985 amendments) advisory committee's note (noting that definition of "government personnel" was intended to clarify the rule in light of the conflict among the courts). In contrast, to date no circuit court has addressed directly the issue presented in this appeal, and very few district courts have done so. *See United States v. Cherry*, 876 F.Supp. 547, 551 (S.D.N.Y.1995); *United States v. Green*, 144 F.R.D. 631, 641 (W.D.N.Y.1992); *United States v. Duncan*, 586

practical and policy considerations are parallel. We thus find it more reasonable that, read in context, "government agent" includes non-federal personnel whose work contributes to a federal criminal "case."

b. "*The case*"

Defendants argue that, even if "government agent" is read to include local law enforcement officers, the police reports at issue here do not fall within the scope of Rule 16(a)(2) because they were prepared before the federal prosecutor initiated "the case." In other words, Defendants argue that, for the purposes of Rule 16(a)(2), a "case" does not begin until a federal prosecutor becomes involved. Again, the government urges a more expansive reading of the term that includes the investigative work done before a federal prosecutor takes on a federal prosecution, if the investigative work concerns a particular defendant and the particular conduct for which he is federally prosecuted.

Defendants assert that the Supreme Court and our court have already addressed this question and have defined "the case" in the limited manner that Defendants propose. To the contrary, the ambiguity of this term remains. Indeed, the opinions that Defendants cite actually weigh in favor of the government's proposed definition.

In *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), the Supreme Court considered whether Rule 16 entitled the defendant to discovery for the purpose of gathering materials in support of a proposed counterclaim of selective prosecution against the federal prosecutors. The defendant sought a list of the racial identities of all defendants prosecuted federally for possession of drugs and firearms during a three-year period.

F.Supp. 1305, 1313 (W.D.Mich.1984); *United States v. DeBacker*, 493 F.Supp. 1078, 1082 (W.D.Mich.1980). We discuss the holdings of those cases in the text below at pp. 1114-16, 1119.

Id. at 459, 116 S.Ct. 1480. The Court held that a "defense" to which the documents must be material means only "an argument in response to the prosecution's case in chief" and, thus, did not include separate counterclaims such as selective prosecution. *Id.* at 462, 116 S.Ct. 1480. In arriving at that conclusion, the Court stated that the term "case," as used in Rule 16(a)(2), does not extend to prosecutions against other people. *Id.*

The logic of *Armstrong* cuts against Defendants' proposed interpretation of "case." In *Armstrong*, the key question in determining the scope of a "case" under Rule 16(a)(2) was whether it involves the same defendant and the same crime. When state or local officials conduct an investigation that ultimately leads to a federal (instead of a state) prosecution against the same defendant for the very activities investigated, *Armstrong* suggests that there is but one "case" against the defendant within the meaning of Rule 16. This concept is particularly applicable in RICO prosecutions where state crimes can be charged as predicate acts to establish a "pattern of racketeering activity." 18 U.S.C. § 1961(1) & (5).

Similarly, in *United States v. Cedano-Arellano*, 332 F.3d 568 (9th Cir.2003) (per curiam), we interpreted Rule 16(a)(2) to apply only to documents generated with a view toward the prosecution of a defendant. In *Cedano-Arellano*, the defendant sought access to the training records of the narcotics-sniffing dog that had alerted police to drugs in the gas tank of the defendant's vehicle. *Id.* at 570. We held that Rule 16(a)(2) did not except the training records from discovery because "they were not made in connection with investigating or prosecuting this or any other case." *Id.* at 571.

The clearest reading of *Cedano-Arellano* supports the conclusion that documents that *are* "made in connection with investigating or prosecuting this or any other case" against a defendant *are* exempt from discovery under Rule 16(a)(2).

Local police reports that result in a federal investigation or prosecution of the same defendant for the same acts are part of "the case" as so understood.

The continuing ambiguity of Rule 16(a)(2), notwithstanding *Armstrong* and *Cedano-Arellano*, is illustrated by the conflicting approaches that district courts have taken in interpreting it. *Compare United States v. Cherry*, 876 F.Supp. 547, 551-52 (S.D.N.Y.1995) (holding that, where the federal prosecution is a direct outgrowth of an investigation by local authorities, the local investigation and federal prosecution are one "case," and the local police reports generated prior to federal involvement are exempt from discovery under Rule 16(a)(2)), *and United States v. Duncan*, 586 F.Supp. 1305, 1313 (W.D.Mich.1984) (denying under Rule 16(a)(2) the defendant's discovery request for all police reports related to his prosecution), *with United States v. DeBacker*, 493 F.Supp. 1078, 1082 (W.D.Mich.1980) (holding that, where state police began an investigation prior to federal involvement, police reports were discoverable under Rule 16); *and United States v. Green*, 144 F.R.D. 631, 641 (W.D.N.Y.1992) ("However, to the extent that the government has in its possession reports or records from state or local law enforcement agencies or prisons, these items are discoverable unless they are the product of a joint investigation or unless they have become the work product of the federal investigators.").

Because the text of Rule 16(a)(2) remains ambiguous after considering its text and context, we turn to other interpretative aids to help resolve the question before us.

2. *Advisory Committee's Intentions*

The Advisory Committee's explanatory notes do not address the question presented here. We must, therefore, find indirect ways to understand the Committee's intent.

Defendants contend that the drafters intended Rule 16(a)(2) to be a "work product" exception and, therefore, that we should limit the rule to the contours of the work product privilege codified in Federal Rule of Civil Procedure 26. We are not persuaded that the drafters meant to limit Criminal Rule 16 to the civil "work product" doctrine. Rule 16 itself, while encompassing government work product and having its genesis in the idea of work product, draws its boundaries more broadly than those of Civil Rule 26. [7]

It is true that Rule 16(a)(2) is often referred to as a "work product" rule. *See, e.g.*, Fed.R.Crim.P. 16 (1975 enactment) advisory committee's note D ("Rules 16(a)(2) and (b)(2) define certain types of materials ('work product') not to be discoverable."); *Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480 (stating that "under Rule 16(a)(2), [the defendant] may not examine Government work product in connection with his case"); *United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir.2000) ("Additionally, Rule 16[(a) (2)] of the Federal Rules of Criminal Procedure recognizes the work

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[7] Rule 26(b)(3) states in relevant part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

By contrast, Rule 16(a)(2) states in relevant part:

Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.

product privilege and exempts from production 'reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case.' ").

At the same time, it is clear that Rule 16(a)(2)'s protection of investigative materials extends beyond the work product privilege as defined in the civil context. Although the Advisory Committee used the term "work product" to describe the materials discoverable under Rule 16(a)(2), it purposefully defined the Rule's scope differently than that of Rule 26. *See* Fed.R.Crim.P. 16 (1975 enactment) advisory committee's note D.

As note D states, in 1975 the House of Representatives proposed to limit the materials covered by Criminal Rule 16(a)(2) to accord with Civil Rule 26. Specifically, the House sought to exempt only "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents." *Id.* The Committee *rejected* that proposal and maintained the more expansive scope that includes all "reports, memoranda, or other internal government documents." *Id.*; *see also In re Grand Jury Subpoenas*, 318 F.3d 379, 383 (2d Cir.2003) (noting that Rule 16 imposes a stricter limit to discovery in criminal matters than Rule 26 imposes in civil litigation).

The Fifth Circuit in *United States v. Mann*, 61 F.3d 326 (5th Cir.1995), also has cautioned that Rule 16 is *not* coextensive with the work product privilege, despite their interrelatedness. The *Mann* court expressly rejected the contention, raised by the defendants there (and by Defendants here), that the Supreme Court equated the two in *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). *Mann*, 61 F.3d at 331.

Although Rule 16 was an issue in *Nobles*, the Court addressed the work product doctrine *separately* from Rule 16 and did not equate them. 422 U.S. at 234-40, 95 S.Ct. 2160.

The Court's comments regarding the work product doctrine are instructive in pointing to a practical interpretation:

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

Id. at 238-39, 95 S.Ct. 2160.

Mann's distinction between the work product doctrine and Rule 16(a)(2) is further illustrated by the differing treatment of investigative reports. Under the work product doctrine, police reports are rarely protected. *See, e.g., Miller v. Pancucci*, 141 F.R.D. 292, 303 (C.D.Cal.1992); 6 James Wm. Moore et al., Moore's Federal Practice § 26.70(c)(iii) (2006). But police reports (at least those created by federal law enforcement officers) plainly are protected under Rule 16(a)(2). *United States v. Jordan*, 316 F.3d 1215, 1227 n. 17 (11th Cir.2003). Thus, again, we can see that Rule 16 is not just a work product rule.

Rather, the drafters intended Rule 16(a)(2) to be a rule of discovery, related to the work product doctrine but not synonymous or coextensive with it. Therefore, we must go beyond the work product doctrine to determine the scope of Rule 16(a)(2).

3. *Symmetry of Obligations*

Rule 16 does not stand in isolation as the sole source of discovery obligations placed on parties to criminal litigation. Instead, Rule 16 acts in concert with other statutory and common law obligations.

a. *The Jencks Act*

The text of Rule 16(a)(2) delimits its own scope by reference to the Jencks Act: "Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500." The best clue that we have as to what the Advisory Committee that drafted Rule 16 intended regarding the scope of Rule 16(a)(2)'s exception is its reference in its committee note to two Jencks Act-related cases, *Palermo v. United States*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959); and *Ogden v. United States*, 303 F.2d 724 (9th Cir.1962).[8]

The Jencks Act requires the government to disclose to criminal defendants any statement made by a government witness that is "*in the possession of the United States* " once that witness has testified. 18 U.S.C. § 3500(a) & (b) (emphasis added).[9] The Act, in its current form, does not

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[8] "Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. *Cf.* [*Palermo* and *Ogden*]." Fed.R.Crim.P. 16(b)(2) (1966 amendment) advisory committee note. (Rule 16(a)(2) was numbered as (b)(2) at the time the committee wrote its note.)

[9] The Jencks Act provides, in pertinent part:

(a) In any criminal prosecution brought by the United States, no statement or report *in the possession of the United States* which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

distinguish between statements obtained by federal officials and statements obtained by state or local officials. Rather, the text of the statute requires that the government disclose all witness statements, regardless whether state obtained or federally obtained, so long as the statements are in the actual possession of the federal government at the time of the trial. *See Palermo*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (describing Jencks Act disclosure requirements and making no distinction based on affiliation of official obtaining the statement); *Ogden*, 303 F.2d 724 (same).[10]

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness *in the possession of the United States* which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

....

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means-

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500 (emphasis added).

[10] Circuit courts that have addressed cases involving state-gathered statements have come to differing conclusions regarding the Jencks Act obligations. *Compare United States v. Heath*, 580 F.2d 1011, 1018-19 (10th Cir.1978) (holding that the federal prosecutor violated the Jencks Act by failing to disclose state-obtained witness statements), *with United States v. Smith*, 433 F.2d 1266, 1269 (5th Cir.1970) (holding that a statement made by a government witness to a state police officer was not subject to the Jencks Act).

In cases relating to the Jencks Act, the key question posed by most courts is that of possession. For example, in *United States v. Higginbotham*, 539 F.2d 17 (9th Cir.1976), we addressed a defendant's request that the federal prosecutors produce photographs that the state police had included in a photo array used to obtain witness identifications of the defendant. We held that the defendants did not have the right to production because the federal prosecutor *never had possession* of the photos. *Id.* at 21. We analogized the case to a Jencks Act request:

> [T]he demand to produce these photographs might well be likened to an attempt to require production under the Jencks Act of statements in the possession of state police. *See Beavers v. United States*, 351 F.2d 507 (9th Cir.1965), where the statements were never in possession of the United States and production was not required.

Id.; *see also United States v. Weaver*, 267 F.3d 231, 245 (3d Cir.2001) (noting, in dictum, that "the Jencks Act only applies to evidence in the possession of the United States, and not state authorities"); *United States v. Harris*, 368 F.Supp. 697, 709 (E.D.Pa.1973) (finding no Jencks Act violation because, "[n]otwithstanding the cooperative law enforcement effort of the Federal and state authorities, the fact of the matter is that the reports in question were compiled by the city police officers, submitted as a matter of course to their superiors in the police department, and are now (and were at the time of trial) in the lawful possession and control of the Philadelphia Police Department"). We think that the drafters intended the same inquiry to be made here.

b. *Rule 16(a)(1)(E)*

Our case law supports a symmetrical reading of Rule 16's discovery obligations. In *United States v. Gatto*, 763 F.2d 1040 (9th Cir.1985), we examined the scope of the

prosecution's duty to disclose evidence to the defendants under Rule 16(a)(1)(E).[11] Specifically, we were asked whether evidence found and held by state authorities until the eve of trial was discoverable to defendants under Rule 16(a)(1)(E). We focused on physical possession as the dispositive factor. *Gatto*, 763 F.2d at 1046-49. We held that the evidence became discoverable only when the state authorities placed it in the hands of the federal authorities, because "the triggering requirement under rule 16[(a)(1)(E)] is that the papers, documents, and tangible objects be in the actual possession, custody or control of the government."[12] *Id.* at 1049.

Gatto's emphasis on possession as the triggering requirement for Rule 16 accords with decisions by this and other circuits. *See, e.g., United States v. Friedman*, 593 F.2d 109, 119-20 (9th Cir.1979) (holding that neither Rule 16 nor the Jencks Act required the production of a document held by a foreign government, because the federal prosecutor did not have possession of it); *United States v. Adkins*, 741 F.2d 744, 747 (5th Cir.1984) (holding that Rule 16(a)(1)(E)'s predecessor "require[s] the government only to turn over those records actually in its possession").[13]

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[11] At the time of *Gatto*, that provision was numbered 16(a)(1)(C). Rule 16 was renumbered in 2002.

[12] We expressly avoided deciding whether "government" included the FBI agents investigating the case, or whether it was limited to the federal prosecutor. *Gatto*, 763 F.2d at 1047.

[13] We note our accord with the Second Circuit's cautionary statement in *In re Jury Subpoenas*, 318 F.3d 379, 384-85 (2d Cir.2003), that the protection established by Rule 16(a)(2) does not extend to "discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents ... [but, rather, by] a third party in the ordinary course of business and that would have been created in essentially similar form irrespective of any litigation anticipated by counsel." (Citation omitted.) In that case, the documents in question were bank records. Here, we address reports created by local police officers for the purpose of recording evidence of Defendants' illegal conduct to support a prosecution of Defendants for that conduct.

Under *Gatto*, state-gathered evidence becomes subject to the disclosure obligation established by Rule 16(a)(1)(E) when it passes into federal possession. We believe that Rule 16(a)(2) is best read to create symmetry between the disclosure obligation and the exception to that obligation. Rule 16(a)(2) is, after all, an exception to the disgorgement requirement of Rule 16(a)(1)(E), which depends on the document's being "within the government's possession, custody, or control." In the context of this appeal, then, investigative reports created by state police officers and turned over to federal prosecutors to support a unified federal prosecution of defendants should be considered reports "made by an ... other government agent in connection with investigating or prosecuting the case."

c. *Form 302s*

In addition to establishing symmetry between the government's Jencks Act obligations and those imposed by Rule 16, the government's proposed reading of Rule 16(a)(2) creates symmetry between the treatment of like investigative reports created by investigating officers. Rule 16(a)(2) exempts reports created by FBI agents (Form 302s) from disclosure. *Jordan*, 316 F.3d at 1227 n. 17.

Under Defendants' limited reading of the Rule, parallel investigative reports created by state or local police officers would be treated differently for the purpose of discovery. The similar reports would be treated differently even if they were created in order to support a prosecution, turned over to federal prosecutors, and used by federal prosecutors in the preparation of a case. That asymmetry is illogical. Symmetry is particularly compelling when evidence of state crimes such as drug dealing, robbery, and murder are predicate acts under RICO to establish a "pattern of racketeering activity" in violation of federal law. 18 U.S.C. § 1961.

4. *Policy Considerations*

Finally, to determine the intent of the drafters of Rule 16(a)(2), we examine policy considerations. In *Cherry*, the District Court for the Southern District of New York addressed squarely the issue before us. It noted:

> This federal prosecution is a direct outgrowth of investigations by local authorities. Those investigations covered the same conduct by the same defendants charged in the federal indictment. For all practical purposes, including the application of Rule 16(a)(2), this local investigation and federal prosecution should be considered one "case." To hold otherwise, thereby making underlying local or state investigatory files subject to pre-trial discovery by a subsequently federally indicted defendant, would in all likelihood inhibit cooperation between local and federal law enforcement agencies, to the benefit of criminals but to the detriment of the public good.

876 F.Supp. at 551-52 (footnotes omitted). Those concerns are echoed here.

The present case involves the federal prosecution of Defendants for, in part, gang activities in violation of RICO, 18 U.S.C. §§ 1961-1968. A number of the predicate acts on which the RICO charge is based are state law crimes, including various counts of murder and attempted murder. It is precisely this type of case in which cooperation between state and federal law enforcement is most crucial. As we explained above, the Advisory Committee signaled the importance and desirability of federal-state cooperation when it explained changes to Criminal Rule 6. Here, San Francisco police officers investigated Defendants' illegal conduct and then turned the results of their investigation over to federal authorities, allowing their work to be subsumed within a

single, unified prosecution of Defendants by the federal authorities.[14]

In conclusion, we hold that Rule 16(a)(2) extends to the San Francisco police reports created prior to federal involvement but relinquished to federal prosecutors to support a unified prosecution of Defendants for the same criminal activity that was the subject of the local investigation. It is an overstatement by the dissent to suggest that our opinion expands the scope of documents covered by Rule 16 and the Jencks Act. We here address witness statements to be used in a federal criminal prosecution but initially given to San Francisco police officers along with the officers' case reports revealing the identities of the witnesses and summarizing their statements. These types of documents have always been protected under federal law if compiled by federal officers. Our opinion recognizes no principled reason why the law should be any different in a federal prosecution regardless of who gathered the statements.[15]

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[14] If the roles were reversed, and FBI officials conducted an investigation, the results of which they delivered to a district attorney for prosecution under state law, the federal rules of procedure would not apply and those reports would be subject to the discovery rules of the state. *See, e.g., People v. Santorelli*, 95 N.Y.2d 412, 718 N.Y.S.2d 696, 741 N.E.2d 493, 497-98 (2000) (holding that district attorney did not violate *Brady* obligations by failing to turn over FBI 302s because the reports were not in the *actual possession* of the district attorney, the federal authorities refused to allow the district attorney access to the reports, and the trial court made a finding that the federal and state investigators acted independently). Again, our interpretation of Rule 16 preserves symmetry, as we believe the drafters intended.

[15] Also, contrary to the dissent's assertion, dissent at 1130, we do not hold that "virtually all documents" that happen to fall into the hands of the federal prosecutor qualify for Rule 16(a)(2)'s discovery exemption. Although federal possession is necessary in order to qualify for the Rule 16(a)(2) exemption, it is not sufficient. A document also must be an internal (nonpublic) document made by an "other government agent in connection with investigating or prosecuting the case." Rule 16(a)(2).

C. Waiver

Notwithstanding its ruling that the police reports were discoverable under Rule 16, the district court held, in the alternative, that the government had waived any potential Rule 16(a)(2) protection of the documents by turning over redacted copies of the reports to Defendants. Applying the principles of the work product privilege, the court held: "Disclosure of privileged material waives the privilege as to all material on the same subject."

As we stated above, Rule 16(a)(2) is not, strictly speaking, a work product privilege. It is, rather, a broader rule of discovery. Therefore, we look for guidance to the general principles of waiver. Waiver is the "intentional or voluntary relinquishment of a known right." Black's Law Dictionary 1580 (6th ed. 1990). It can be either express or implied. *Id.*

The Fifth Circuit's discussion in *Mann* analyzes a situation similar to the one we consider here. In *Mann*, the government had allowed the defendants access to documents protected by Rule 16(a)(2) through an express agreement between the parties that the defendants would not copy the materials. 61 F.3d at 329. The defendants broke the no-copying agreement, and the government rescinded access. *Id.* The defendants challenged-on the basis of waiver-the validity of the government's change of heart. They argued "waiver" as it applies to the work product privilege and cited *Nobles* in support. *Id.* at 331. The *Mann* court held, first, that Rule 16(a)(2) and the work product privilege are not synonymous and that *Nobles* did not make them so:

> *Nobles*, which was not concerned with Rule 16(a)(2), cannot be read to alter the plain language of a rule it did not address.... In short, we do not think that *Nobles* expands the attorney work product privilege to other government agent internal reports, such as those contemplated in Rule 16(a)(2).

Id. Applying general principles of waiver, the Fifth Circuit held that the government did not waive its Rule 16(a)(2) protection by allowing the defendants to have conditional access to the protected documents. *Id.* at 332.

Although the facts before us differ from those of *Mann* in certain respects, we reach the same result. Here, the government did not execute an express disclosure agreement. But it has clearly and consistently articulated its intention to preserve the confidentiality of inculpatory-witness identifications. It carried through on that intention with regard to the police reports by systematically redacting all witness locator information, while permitting Defendants access to the substantive information contained within the reports. The government's consistent and systematic retention of control over witness-identifying information demonstrates that it did *not* intentionally or voluntarily relinquish its rights under Rule 16(a)(2) to hold back this information from discovery.

We hold that the government's disclosure of redacted copies of local police reports, where the redactions were consistent and supported by an articulated intention to protect witness identities in the context of a case in which the district court has already found a serious risk of harm to witnesses, does not constitute a waiver of the documents' Rule 16(a)(2) protection.

D. *Expert Use*

The district court also held, in the alternative, that the government had waived any potential Rule 16(a)(2) protection by allowing one of its gang-crimes experts to rely on the protected materials in developing his opinions. The government concedes that materials on which a proposed expert witness relies must be produced to Defendants in discovery, and we agree. The government disputes, however, that the expert relied on the police reports at issue here. This

is a question of fact that we remand to the district court for it to determine.

E. *Sanction Appeal*

Because we reverse the district court's June 16 discovery order, we also reverse its July 20, 2006, sanction order. Consequently, we need not reach the government's challenge to the sanction imposed by the district court.

F. *Cross-Appeal*

We do not have jurisdiction over Defendant's cross-appeal of the July 20, 2006, sanction order. *See United States v. Eccles*, 850 F.2d 1357, 1361 (9th Cir. 1988) ("[A] defendant may not cross-appeal from an interlocutory appeal under [18 U.S.C. §] 3731.").

G. *Petition for Mandamus*

Finally, we turn to the government's petition for mandamus, which challenges the district court's August 26, 2005, order requiring the government to produce a list of witnesses 21 days before trial, pursuant to 18 U.S.C. § 3432.[16] Given our ruling regarding the government's discovery obligations under Rule 16 and the effect that this ruling will have on the overall management of discovery in this case, and given the fact that the time for compliance has not yet arrived, we decline to reach the merits of the government's petition for mandamus at this time and,

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[16] Title 18 U.S.C. § 3432 provides:

> A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment ... and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each ... witness, except that such list of the ... witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

instead, remand all discovery issues to the district court for reconsideration.

CONCLUSION

The cross-appeal filed by Defendants Fort and Diaz (No. 06-10478) is DISMISSED. The following orders issued by the district court are VACATED:

> 1. May 18, 2006-Order re Discoverability of Local Police Reports Under Rule 16 and Schedule for Further Submissions, Doc. # 367;
> 2. June 16, 2006-Concluding Order re Local Police Reports and Rule 16 Discovery, Doc. # 472; and
> 3. July 20, 2006-Testimony Preclusion Order as Sanction for Non-Compliance with Rule 16 Orders, Doc. # 578.

All matters relating to the discovery of materials pursuant to Rule 16 are REMANDED to the district court for reconsideration in the light of this opinion.

WILLIAM A. FLETCHER, Circuit Judge, dissenting.

I respectfully dissent.

The government seeks to use Federal Rule of Criminal Procedure 16(a)(2), which protects work product, to serve the purposes of Rule 16(d)(1), which protects witnesses. The government is very open in stating that it seeks to protect its witnesses rather than its work product. In the first paragraph of its brief, it writes:

> This combined appeal and petition arise out of a complex prosecution of twelve members of ... a violent street gang in San Francisco, California.... [C]ivilian witness safety is a paramount concern in this prosecution. The legal issues presented by this

> brief are critically important for the protection of civilian witnesses.

The district court entered what it described as a "very strong, muscular protective order." The government, however, is not satisfied with the protection this order-or indeed any order-can provide to its witnesses. The government writes that it "firmly believes that no protective order, no matter how restrictive its terms, is sufficient to protect the safety and lives of these witnesses." For that reason, the government steadfastly refused to assist the district court in crafting any protective order that would require disclosure of the names or identifying information of witnesses at any time before trial. The district court finally said in frustration:

> I gave you two opportunities [to participate in the drafting process]. I said, "Government, please, help me draft this protective order." You said no, you thumbed your nose at the Court, and said, "No, a thousand times no, we don't want a protective order." That's all you said.

[SER tab 11, at 44]

The protective order entered by the district court in this case requires the government to make available to defendants' counsel the unredacted names of prospective witnesses. The order then places severe restrictions on the use counsel may make of the names and any identifying information. Up until 21 days before trial, defendants' counsel are strictly forbidden from disclosing to defendants any "identifying information on protected witnesses" either "directly or indirectly." Within 21 days of trial, witness names and identifying information can be revealed to the defendants, subject to certain restrictions. Neither the majority nor I address the government's mandamus challenge to the district court's requirement that names and identifying information be turned over within 21 days of trial.

The government has refused to comply with the district court's order. Specifically, it has refused to provide witness names or identifying information contained in police reports prepared by officers of the San Francisco Police Department. The government contends that these reports are protected as government work product under Rule 16(a)(2), even though the reports were prepared long before it had any involvement with the investigation and prosecution of these defendants. Despite its claim that the entire reports are protected as work product under Rule 16(a)(2), the government is willing to hand them over after redaction. But it insists that Rule 16(a)(2) allows it to redact names and identifying information.

The government and the majority misunderstand and therefore misuse Rule 16(a)(2). Rule 16(a)(2) is designed to protect only the government's work product in connection with a criminal case: "[U]nder Rule 16(a)(2), [a defendant] may not examine *Government work product* in connection with his case." *United States v. Armstrong*, 517 U.S. 456, 463, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (emphasis added). Because the reports in question are the work product of the San Francisco Police Department, not of the government, they are not protected by Rule 16(a)(2). To the extent the government is concerned about the safety of its witnesses, its remedy is a protective order under Rule 16(d)(1).

I. Overview

Federal Rule of Criminal Procedure 16 deals with pretrial discovery in federal criminal cases. Rule 16 was adopted "in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence." Fed.R.Crim.P. 16 advisory committee's note (1974

Amendment); *see also United States v. Howell*, 231 F.3d 615, 626 (9th Cir.2000).

Notwithstanding the goal of "broad discovery," two subsections of Rule 16-Rules 16(a)(2) and 16(b)(2)-carve out "information not subject to disclosure" by the government and the defendant respectively. As the Advisory Note to Rule 16 explains, these subsections "set forth 'work product' exceptions to the general discovery requirements." Fed.R.Crim.P. 16 advisory committee's note (1975 Enactment); *see also Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480; *United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir.2000) ("Rule 16 of the Federal Rules of Criminal Procedure recognizes the work product privilege...."). Because Rule 16(a)(2), which protects the government's work product, is an exception to the disclosure provisions that comprise the greater part of Rule 16(a), the exception must be construed "narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed.2d 753 (1989).

II. The Text of Rule 16(a)(2)

Statutory interpretation begins with the text of the statute or rule. *United States v. Hoffman*, 794 F.2d 1429, 1431 (9th Cir.1986) (interpreting Rule 16). The plain meaning of a statute or rule is "controlling absent a clearly expressed Congressional intention to the contrary." *Id.* at 1432. We presume that "identical words used in different parts of the same [rule]" are "intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (internal quotation marks omitted). Ordinarily, a rule should be interpreted to give effect to every clause and word contained in it. *See Negonsott v. Samuels*, 507 U.S. 99, 106, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993); *Moskal v. United States*, 498 U.S. 103, 109, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). In considering plain meaning, it is necessary to keep in mind the context of particular language and the structure of the statute or rule as a

whole. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

Rule 16(a)(1) requires the government to turn over certain things to the defendant in advance of trial. Pertinent to this case, Rule 16(a)(1)(E) requires the government, upon request, to permit the defendant to "inspect and to copy ... documents ... if the item is within the government's possession, custody, or control and ... the item is material to preparing the defense." The government has conceded that the police reports in question are "documents" within the meaning of Rule 16(a)(1)(E).

Rule 16(a)(2) provides a work-product exception to the obligation imposed under Rule 16(a)(1)(E). *See United States v. Cedano-Arellano*, 332 F.3d 568, 571 (9th Cir.2003); Majority Op. at 1110 n. 2. In relevant part, Rule 16(a)(2) provides:

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other [1] *internal government documents* [2] *made by* [3] *an attorney for the government or other government agent* in connection with investigating or prosecuting the case.

(Bracketed numbers and emphasis added.) The meaning of Rule 16(a)(2) is so plain that it should be unnecessary to do anything more than simply to read the text in order to conclude that it does not protect documents prepared by the San Francisco Police Department without any involvement by the federal government. But because the majority concludes otherwise, I engage in a detailed analysis of the text.

Rule 16(a)(2) contains three phrases that have particular relevance to this case. These are the numbered

italicized phrases above-"internal government documents," "made by," and "an attorney for the government or other government agent." I discuss each in turn.

A. "Internal Government Documents"

Rule 16(a)(2) limits the "information" it protects to "reports, memoranda, or other *internal government documents.*" (Emphasis added.) "Internal government documents" are a subclass of documents "within the government's possession, custody, or control" that must otherwise be produced under Rule 16(a)(1)(E). The *Oxford English Dictionary* (2d ed. 1989) defines "internal" as "[p]ertaining to the inner nature or relations of anything, as distinguished from its relations to things external to itself." *Id.* at 1121 (vol.VII). We have previously held that the term "government" in Rule 16, as used in relation to documents within the government's "possession, custody, or control," refers to the "federal government." *United States v. Gatto*, 763 F.2d 1040, 1048-49 (9th Cir.1985); *see also United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374-75 (9th Cir.1987). The majority concedes that the term "government," as it is used throughout Rule 16(a)(2), refers to the "federal government." Majority Op. at 1111 (" 'government' means 'federal government' in Rule 16(a)(2)"). "Internal government documents" are therefore documents "pertaining to the inner nature or relations of [the federal government], as distinguished from its relations to things external to itself." Documents generated outside the federal government without federal involvement for non-federal purposes are not "internal government documents" within the meaning of the rule.

B. "Made By"

Rule 16(a)(2) further requires that the documents be "made by" a federal government attorney or other government agent. The *Oxford English Dictionary* defines "made" as "produced or obtained by 'making' as

distinguished from other modes of origin or acquisition." *Id.* at 174 (vol.IX). Documents cannot be made by federal government attorneys or agents if they are made by someone else. The phrase "made by," like "internal government," thus signals that documents protected from disclosure by Rule 16(a)(2) are a subclass of the broader class of documents "within the government's possession, custody, or control" described in Rule 16(a)(1)(E).

C. "An Attorney for the Government or Other Government Agent"

Finally, internal government documents must be made by "an attorney for the government or other government agent." It is undisputed that the police reports at issue were not made by an attorney. Rather, they were made by officers of the San Francisco Police Department. The question is whether the San Francisco police officers who made the reports were "other government agents" within the meaning of Rule 16(a)(2). To answer this question, we must determine the meaning of the terms "government" and "agent," and the function of the modifier "other."

1. "Government"

The term "government" refers to the federal government in Rule 16(a)(2), as conceded by the majority.

2. "Agent"

The term "agent" encompasses only a person who acts with the authority or apparent authority of the principal. *Black's Law Dictionary* defines "agent" as "[o]ne who is *authorized to act* for or in the place of another." *Black's Law Dictionary* 68 (8th ed.2004) (emphasis added). To "authorize" is "to give legal authority; to empower ... to formally approve; to sanction." *Id.* at 143. The term "agent" is sufficiently broad to encompass state or local law enforcement personnel working alongside, or on behalf of,

the federal government, as in a cooperative joint investigation. However, the term does not encompass state and local personnel who at the time of their actions had no authority, real or apparent, from the federal government. That is, the term "agent" requires prior or contemporaneous authorization of the agent by the federal government.

Reading the term "agent" to require prior or contemporaneous authorization is consistent with other uses of that term in Rule 16. For example, Rule 16(a)(1)(C) speaks of persons who are "legally able to bind the defendant regarding the subject of [a] statement ... [or] conduct because of that person's position as the defendant's director, officer, employee, or *agent.*" (Emphasis added). This passage mirrors the ordinary definition of "agent" as "[o]ne who is *authorized to act* for or in the place of another." In *United States v. Taylor*, 417 F.3d 1176 (11th Cir.2005), the Eleventh Circuit employed this definition of "agent" under Rule 16(a)(1)(A). The court held that a former cellmate of the defendant, who wrote a letter to the government six months before trial describing the defendant's purported jailhouse confession, "was not, at any time, a government agent" under Rule 16. *Id.* at 1181-82.

There is clear symmetry between Rules 16(a)(2) and 16(b)(2). Both sections employ virtually identical language when describing the protected work product of the government (Rule 16(a)(2)) and the defendant (Rule 16(b)(2)). Rule 16(b)(2) allows the defendant to refuse to disclose "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense," as well as certain statements "made to the defendant, or the defendant's attorney or agent." In interpreting Rule 16, the Supreme Court has been guided by "perceptible symmetr[ies]" in its language. *Armstrong*, 517 U.S. at 462, 116 S.Ct. 1480. The majority does not even mention Rule 16(b)(2), let alone consider the implications for that section of its broad reading of "agent" in Rule 16(a)(2). If making and later giving a document to the federal

government can make a person a "government agent" within the meaning of Rule 16(a)(2), virtually all of the materials that would otherwise be required by Rule 16(a)(1) to be disclosed can be protected from disclosure by the mere act of giving them to the government. I would be very surprised if the majority would embrace a symmetrical reading of Rule 16(b)(2), in which the same definition of "agent" would provide a criminal defendant the same ability to avoid disclosure of documents otherwise required to be disclosed under Rule 16(a)(1).

3. "Other"

The natural reading of the phrase "other government agent" is that it means any "agent of the federal government" other than an "attorney for the government." *See* Fed.R.Crim.P. 1(b)(1) (defining "attorney for the government" as an attorney employed or "authorized by" the federal government). However, the government argues that the word "other" modifies only the word "government" rather than the two-word phrase "government agent." Under the government's reading, "other government agent" means agent of some government other than the federal government. If we read "other government agent" to mean "agent for another government," as the government suggests, there would still be work-product protection for the work of an "attorney for the government." But there would be no work-product protection for the work of any other agent of the federal government. That is, under the government's reading, there would be no work-product protection for documents prepared by an FBI agent working on a federal criminal case. This is manifestly absurd. I am confident that the government would not argue for this reading of "other government agent" in a case where documents made by an FBI agent were at issue. *See United States v. Jordan*, 316 F.3d 1215 (11th Cir.2003).

D. Conclusion

I conclude from the foregoing that reports made by members of the San Francisco Police Department, long before the involvement of the federal government in the investigation and prosecution of the defendants in this case, are not protected work product under the plain meaning of Rule 16(a)(2).

III. Majority's Arguments

The majority makes a number of arguments to escape from the plain meaning of Rule 16(a)(2). I address them in turn.

A. Meaning of "Government Agent" in Rule 16(a)(1)

The majority argues that "other government agent" in Rule 16(a)(2) should be given the same meaning as "government agent" in Rule 16(a)(1). In relevant part, Rule 16(a)(1) provides:

> **(A) Defendant's Oral Statement.** Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, *in response to interrogation by a person the defendant knew was a government agent* if the government intends to use the statement at trial.
>
> **(B) Defendant's Written or Recorded Statement.** Upon a defendant's request, the government must disclose to the defendant
>
> ...
>
> (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement *in*

> *response to interrogation by a person the defendant knew was a government agent* [.]

(Emphasis added.) One court of appeals has held, without discussion, that "government agent," as used in Rule 16(a)(1), includes an agent of a state or local government. *See United States v. Mitchell*, 613 F.2d 779, 781 (10th Cir.1980). Other courts of appeals, including our own, have treated state or local police officers as "government agents" under Rule 16(a)(1), but only in the context of cooperative activity. *See United States v. Cooper*, 800 F.2d 412, 416 (4th Cir.1986) (official at prison housing District of Columbia and federal prisoners); *United States v. Rinn*, 586 F.2d 113, 115, 120 (9th Cir.1978) (local police officers cooperating in a joint investigation financed by the Drug Enforcement Agency).

For two reasons, I disagree with the majority's argument. First, the majority's argument is, in effect, an argument that the word "government" in the phrase "other government agent" in Rule 16(a)(2) means any government, whether federal, state, or local. But the majority has explicitly disavowed this interpretation of the term "government" in Rule 16(a)(2). Two paragraphs before it argues for a parallel interpretation of the term "government agent" in Rule 16(a)(1) and "other government agent" in Rule 16(a)(2), the majority writes that " 'government' means 'federal government' in Rule 16(a)(2)." Majority op. at 1111.

Second, the functions of Rules 16(a)(1) and 16(a)(2) are entirely different. Rule 16(a)(1) imposes a broad discovery obligation on the government. As we wrote in *Howell*, Rule 16 was intended to facilitate the "broad discovery" needed for "the fair and efficient administration of criminal justice." 231 F.3d at 625 (quoting Fed.R.Crim.P. 16 advisory committee's note (1974 Amendment)). The history of amendments to Rule 16 makes clear the fundamental importance attached by the rulemakers to broad

discovery and avoidance of unfair surprise. *See* Fed.R.Crim.P. 16 advisory committee's note (1966 Amendment) ("The rule has been revised to expand the scope of pretrial discovery."); *id.* (1974 Amendment) ("Rule 16 is revised to give greater discovery to both the prosecution and the defense."); *id.* (1975 Enactment) ("The Committee believes that it is desirable to promote greater pretrial discovery."); *id.* (1991 Amendment) ("The amendment ... expands slightly government disclosure ...."); *id.* (1993 Amendment) ("New subdivisions ... expand federal criminal discovery...."). "One of the objectives of Rule 16 is to eliminate the idea that a criminal trial is a sporting contest in which the game of cat and mouse is acceptable." *Howell*, 231 F.3d at 626. It is thus at least consistent with the purpose of Rule 16 to read Rule 16(a)(1) broadly to include a requirement that the federal government disclose to a defendant any prior statement made by that defendant to a law enforcement official, whether that statement was made to a federal, state, or local official.

By contrast, Rule 16(a)(2) is a work-product exception to the broad disclosure requirement imposed by Rule 16(a)(1), which we read narrowly to preserve the operation of the provision to which it is an exception. *Clark*, 489 U.S. at 739, 109 S.Ct. 1455. Rule 16(a)(2) protects only the work product of the federal government. It therefore makes sense that the phrase "other government agent" in Rule 16(a)(2) be read to refer only to agents of the federal government whose work product is being protected. If Rule 16(a)(2) were read more broadly to protect documents made by state or local law enforcement officials, the rule would be protecting the work product of a state or local government as well as the work product of the federal government.

B. Parallel to Rule 6

Notwithstanding its concession that the term "'government' means 'federal government' in Rule 16(a)(2)," the majority argues that the text of Federal Rule of

Criminal Procedure 6(e)(3) indicates the term might include state and local government. Rule 6(e)(3)(A)(ii) carves out a limited exception to grand jury secrecy by allowing "an attorney for the government" to disclose "grand-jury matter" to "*any* government personnel-*including those of a state or state subdivision, Indian tribe, or foreign government* " if "necessary to assist in performing that attorney's duty to enforce federal criminal law." (Emphasis added.) The Rules Advisory Committee added the italicized language in 1985 after some district courts held that the phrase "government personnel" did not include state or local officials cooperating with federal attorneys. Fed.R.Crim.P. 6 advisory committee's note (1985 Amendment); *United States v. Pimental*, 380 F.3d 575, 595 (1st Cir.2004).

Ordinary rules of statutory construction demand that the term "government" not be interpreted to mean the same thing as the phrase "any government ... including ... a state or state subdivision, Indian tribe, or foreign government." *See Negonsott*, 507 U.S. at 106, 113 S.Ct. 1119; *Moskal*, 498 U.S. at 109, 111 S.Ct. 461. In fact, Rule 6(e)(3)(A)(ii) itself shows that if the Rules Advisory Committee intended Rule 16(a)(2) to protect the work product of state and local, as well as federal, law enforcement officers, it knew very well how to express that intent. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404, 111 S.Ct. 840, 112 L.Ed.2d 919 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and brackets omitted)). The committee has likely declined to amend Rule 16(a)(2) because the phrase "government agent" means exactly what the committee and Congress intend it to mean-an agent of the federal government.

C. Parallel to Protection of Work Product in Civil Cases

The majority argues that we need not read Rule 16(a)(2) narrowly because it is "not just a work product rule." Majority Op. at 1116. As the majority concedes, however, the Rules Advisory Committee, the Supreme Court, other courts of appeals, and our own court have all characterized Rule 16(a)(2) as a work-product exception. *See* Fed.R.Crim.P. 16 advisory committee's note (1975 Enactment); *Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480; *Fernandez*, 231 F.3d at 1247; *In re Grand Jury Subpoenas*, 318 F.3d 379, 383-84 (2d Cir.2003); *Virgin Islands v. Fahie*, 419 F.3d 249, 257 (3d Cir.2005); *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671, 676 (7th Cir.1977); *United States v. Fallen*, 498 F.2d 172, 175 (8th Cir.1974).

Neither the language nor history of Rule 16(a)(2) suggests that the rulemakers intended to expand its protection beyond traditional work product-that is, protection of materials made by a party or its agent in connection with litigation, including, but not limited to, mental impressions, conclusions, opinions, and legal theories. The text of Rule 16(a)(2), the criminal work-product exception, differs somewhat from that of Federal Rule of Civil Procedure 26(b)(3), the civil work-product exception. But the important difference between the criminal and civil work-product rules lies not in the types of materials they protect, but rather in the fact that the criminal rule, unlike the civil rule, protects against the disclosure of work product even upon a showing of need. *See* Fed.R.Civ.P. 26(b)(3); *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 576-77 (9th Cir.1992); *In re Cendant Corp. Sec. Lit.*, 343 F.3d 658, 663 (3d Cir.2003); *In re Grand Jury Subpoenas*, 959 F.2d 1158, 1166 (2d Cir.1992). There is nothing in the two rules to suggest that they define differently the government and its agents in describing the scope of the government's work product.

D. Symmetry

The majority argues that the work-product protection of Rule 16(a)(2) should be read "symmetrically" with other discovery obligations under Rule 16. The majority takes this term from *Armstrong*, in which the Supreme Court construed the then-current version of Rule 16(a)(1)(C) "symmetrically." *Armstrong*, 517 U.S. at 462, 116 S.Ct. 1480. The defendant had sought to prove selective prosecution by the government, and had accordingly sought discovery of documents in other cases brought by the government. The defendant relied on his entitlement, under Rule 16(a)(1)(C), to "documents ... which are within the possession, custody or control of the government, and which are *material to the preparation of the defendant's defense* or are intended for use by the government as evidence in chief at the trial[.]" Fed.R.Crim.P. 16(a)(1)(C) (1996) (emphasis added). The Court held that these documents were not discoverable, concluding that the defendant's "defense," within the meaning of Rule 16(a)(1)(C), was symmetrical to the government's "evidence in chief." *Armstrong*, 517 U.S. at 462, 116 S.Ct. 1480. Since the defense of selective prosecution would not be presented as responsive to the government's case in chief, information material to that defense was not discoverable at trial.

I agree with the majority that "symmetry" is relevant to the construction of Rule 16. But the majority seeks to create symmetry where none should exist. Worse, it ignores the symmetry that clearly does exist. I first respond to the majority's erroneous symmetry arguments. I then point out the symmetry that the majority ignores.

1. The Majority's Symmetry Arguments

a. The Jenks Act and Rule 16(a)(1)(E)

The majority argues that because "physical possession" is the "dispositive factor" in determining whether

material is discoverable under the Jencks Act and Rule 16(a)(1)(E), symmetry requires that it also be the test for whether documents are excepted from discovery under the work-product protection of Rule 16(a)(2). Majority Op. at 1116. This argument ignores the plain language of Rule 16(a)(2), which protects only "internal documents ... made by" the federal government. On its face, this category of documents is not coterminous with documents in the "possession" (Jencks Act), or "possession, custody, or control" (Rule 16(a)(1)(E)), of the federal government. Rather, it represents a narrower subset of them.

Moreover, the result of the majority's argument is absurd. Like Rule 16(a)(1)(A), the Jencks Act and Rule 16(a)(1)(E) are discovery rules requiring disclosure. By contrast, Rule 16(a)(2) is an exception to a rule requiring disclosure. Reading an exception so that its scope is identical to the rule that it modifies makes no sense. In that event, the exception entirely obliterates the rule. This is why the Supreme Court has counseled not that exceptions be read as symmetrical to rules, but rather that they be read narrowly. *Clark*, 489 U.S. at 739, 109 S.Ct. 1455.

b. FBI "Form 302" Reports

The majority argues that it would create an "asymmetry" to protect Form 302 reports made by FBI agents under Rule 16(a)(2), but not to protect similar reports created by state or local police officers. Majority Op. at 1119. This difference in treatment is, indeed, an asymmetry. But it is one clearly contemplated by the work-product protection of Rule 16(a)(2). The difference in treatment between FBI reports and state and local police reports reflects the distinction, fundamental to the work-product exception, between documents made by a party or its agent, which are protected, and documents created by a non-party, which are not. The purpose of the work-product exception – to give parties freedom and incentive to develop their own cases, *see United States v. Nobles*, 422 U.S. 225, 239-40, 95 S.Ct. 2160,

45 L.Ed.2d 141 (1975)-simply is not "promoted by shielding from discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents." *In re Grand Jury Subpoenas*, 318 F.3d at 384.

2. Symmetry Argument Ignored by the Majority

The majority ignores the obvious symmetry between Rule 16(a)(2) and the parallel provision in Rule 16(b)(2). Rule 16(a)(2) protects the work product of the government. Rule 16(b)(2) protects the work product of the defendant. In relevant part, Rule 16(a)(2) protects against "the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." In relevant part, Rule 16(b)(2) protects against "discovery or inspection of ... reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense[.]" That Rule 16(a)(2) and Rule 16(b)(2) share nearly identical texts is consistent with the rulemakers' broader intent that Rule 16 create reciprocal discovery rights and obligations between the government and the defendant. *See* Fed.R.Crim.P. 16 advisory committee's note (1975, 1993, and 1997 Amendments).

Symmetry demands that if the government is allowed, under Rule 16(a)(2), to refuse to disclose any document that comes into its possession, custody, or control, regardless whether it was "made by" a federal "agent," defendants should be afforded comparable protection from disclosure by Rule 16(b)(2). But I find it difficult to believe that either the government or the majority would support such a "symmetrical" reading where documents in the possession of the defense are at issue and are otherwise discoverable under Rule 16.

Conclusion

The government is very appropriately concerned in this case about the safety of prospective witnesses. But the witness protection problem cannot be solved by reading the work-product exception in Rule 16(a)(2) so broadly that it effectively obliterates the discovery mandated by Rule 16(a)(1). As the government and the majority read Rule 16(a)(2), the work-product rule protects virtually all documents now in the possession of the government, whether or not those documents were made by agents of the federal government, and whether or not those documents endanger the safety of any witnesses. Under the majority's reading, it is enough that the documents be relevant to the case, and that they have been given to and are in the possession of the federal government.

The government has emphasized throughout this case, both in the district court and here, that it is concerned about witness safety. Rule 16 includes a provision that is much better suited for the protection of witnesses than the work-product rule. That provision is Rule 16(d)(1) ("Protective and Modifying Orders"), under which the court may "[a]t any time ... for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." The Rules Advisory Committee specifically designed Rule 16(d)(1) to provide a mechanism to protect witness safety, and to grant considerable discretion to the district court in drafting orders under that rule. *See* Fed.R.Crim.P. 16 advisory committee's note (1974 Amendment). In fact, the district court in this case entered a very extensive protective order under Rule 16(d)(1). Any debate about whether the district court's order has sufficiently protected witnesses is a debate about the drafting of a protective order under Rule 16(d)(1). It should not be a debate about the scope of work-product privilege under Rule 16(a)(2).

**UNITED STATES DISTRICT COURT,
N.D. CALIFORNIA**

UNITED STATES of America, Plaintiff,

v.

Edgar DIAZ, Rickey Rollins, Don Johnson, Robert Calloway, Dornell Ellis, Emile Fort, Christopher Byes, Paris Ragland, Ronnie Calloway, Allen Calloway, and Redacted Defendants Nos. One & Two, Defendants.

No. CR 05-0167 WHA

July 20, 2006

TESTIMONY-PRECLUSION ORDER AS SANCTION FOR NONCOMPLIANCE WITH RULE 16 ORDERS

WILLIAM ALSUP, District Judge.

INTRODUCTION

In this RICO gang prosecution against ten accuseds, this order imposes a testimony-preclusion sanction on the government for its deliberate, substantial and unjustified violation of Rule 16 discovery orders. The essence of the matter is this: Rule 16 requires the government to disclose certain documents, photographs and other items to the defense. The government has no more unilateral right to redact names of potential witnesses from Rule 16 documents than it does to blot out faces of potential witnesses in Rule 16 photographs. Only the district court can authorize such redactions in discoverable information. Rule 16(d) so provides. Contrary to the government, it does not have an inalienable right under a separation-of-powers theory (or otherwise) to remove names from discoverable materials. The government's deliberate, substantial and unjustified violation of direct orders to provide discovery owed under

Rule 16 warrants the sanction imposed below.

STATEMENT

The case was commenced on March 10, 2005, and is set for trial on January 22, 2007. The effect of three recent orders has been to require the government to allow defense inspection of redacted names of potential leads in Rule 16 material so long as the defense teams requesting the inspection sign onto a comprehensive protective order aimed at safeguarding witness security. The recent orders are: (i) the "Protective Order for Witness Security," (ii) a "Memorandum Opinion Re Protective Order for Witness Security," and (iii) a "Concluding Order Re Local Police Reports and Rule 16 Discovery," all dated June 16, 2006. These followed an earlier "Order Re Discoverability of Local Police Reports Under Rule 16 and Schedule for Further Submissions" dated May 18, 2006. Those orders set forth the history.

In brief, the federal prosecutors obtained and voluntarily turned over to the defense many thousands of pages of local police documents but redacted therefrom *all* names and other identifying information on *all* civilians providing any information whatsoever to local law enforcement, whether exculpatory or inculpatory, significant or insignificant. These local documents, some many years old, bear on the gang activities at issue, including the homicides and other racketeering acts involved in this case. The redactions range from a half dozen blot-outs per page to removal of entire paragraphs, even some whole pages, that the prosecutors fear will allow the defense to guess a source's name. Defense counsel have protested these erasures for over a year. This has culminated in the rulings at issue.[1]

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[1] No Form 302s have been produced. No order has required their production. The issue concerns local police reports gathered by the federal prosecutors. The redactions have been made by the federal prosecutors, not by the local police.

The rulings held that: (i) the local police reports, once obtained by the federal prosecutors, were "documents" under Rule 16(a)(1)(E); (ii) such documents fell within the federal work-product exemption from discovery in Rule 16(a)(2) *only* if prepared in connection with investigating or prosecuting the subject case by police officers having a relationship to the federal prosecutors substantially equivalent to that of federal investigative agents (such as a joint task force); (iii) the federal prosecutors herein had failed, despite multiple invitations, to establish any such relationship; and, alternatively, (iv) assuming for the sake of argument that they might once have been federalized work product under Rule 16(a)(2), such protection was waived by the voluntary disclosure of most of their content.

The rulings further held, however, that the government could continue to redact identifying information (in order to safeguard potential witnesses) but had to allow inspection of the originals (except for addresses and other locator data) by defense teams subjecting themselves to a protective order tailored to specific witness-security demands of this case. The defense teams for defendants Robert Calloway, Edgar Diaz, and Emile Fort have executed the required commitments. They have formally requested inspection. Nonetheless, the government refuses to allow the inspection, having filed a "notice of noncompliance" stating that it will not honor the orders in question. Said defendants now move for sanctions.

ANALYSIS

For the reasons stated in the order dated August 26, 2005 (at page 5), the references to information sources in the police documents at issue are not Jencks Act statements. The Act covers statements that are signed or substantially verbatim recordings or otherwise adopted by the witness. 18 U.S.C. 3500(e). The items in question do not come close to being true Jencks Act statements. This correction must be emphasized because the government often lapses into calling

the affected passages "Jencks Act material" (Br.7-8).

The government is also fond of saying that the rulings require it to disclose its trial witnesses. This is also misleading. All that the orders do is restrict the ability of the government to remove names of information sources from discoverable material. As stated, the government has no more right to blot out names in Rule 16 "documents" than it has to blot out faces or license plates in Rule 16 "photographs." Once material is discoverable under Rule 16, it is axiomatic that the Court may require *all* of it to be produced without any redactions. Instead, the orders in question allow the redactions to continue but allow defense teams submitting to a severe protective order to visit the prosecutor's office and to inspect the originals (except for locator data). If Rule 16 allows the greater, it surely allows the lesser. Again, the rulings at issue allow access only to documents discoverable under Rule 16.

Providing Rule 16 material, which happens to include names of information sources, is not the same as providing a government trial-witness list. Such information sources may be called or *not* be called as trial witnesses. They may wind up being defense witnesses. They may wind up being prosecution witnesses. Or neither. Conversely, the names at issue almost surely will miss altogether some who will testify.

Under a separation-of-powers argument newly advanced, the government maintains that it, not a court, decides what is and is not disclosable by way of "witness information." The short answer to this is Rule 16 itself. Under Rule 16(d) concerning protective orders, the judge-not the government-has the power to allow redactions from otherwise discoverable material. The intent of the discovery orders at issue has been to allow access only to what Rule 16 authorizes and, even then, to allow redactions to continue but with a corresponding right of inspection under stringent conditions. That the orders in question have recently and

more precisely calibrated the risk level to various witnesses in no way affects the main point. All it means is that the orders will allow the government to delay inspection of Rule 16 documents even longer as to "primary witnesses" than for "secondary witnesses." The main point-that the local police documents held by the federal prosecutors are discoverable under Rule 16-remains true for both categories of witnesses.

An earlier order found that the Down Below Gang, the alleged RICO enterprise in question, had a practice of intimidating and threatening witnesses against them. The government is correct to remind us of this finding. This order stands by this finding. As the Court has become more familiar with the materials, however, it has become clear that a more particularized witness-by-witness risk assessment is necessary. To take one type of recurring example, the indictment itself already names publicly various victims of car jacking, assaults and other predicate acts. *By virtue of the government's own pleading, therefore, the Down Below Gang has already obtained the names of these probable witnesses.* What, then, is the government's point in redacting these already-known names from discovery on the details of these specific incidents? None. What is important is to protect the address and other locator data. Locator data will not be furnished-even to counsel-under the protective order. Even names exposed in the inspection process, moreover, must be kept from the accuseds until 21 days before trial.

On the other hand, some eyewitnesses still live in the vicinity and may or may not be known to the Down Below Gang. Their names (as well as locator data) deserve even greater protection. Such witnesses were, therefore, ruled to be "primary witnesses" and subject to more stringent safeguards. The recent memorandum opinion listed ten factors used by the Court to classify primary versus secondary witnesses (see pages 6 and 7 thereof). Both types were accorded protection. Primary witnesses were accorded more. (The classification was made based upon a witness-by-witness risk assessment filed by the government under seal

and *ex parte.)*

Another government theme is that we are still six months before trial. This is repeated over and again, as if the government were prepared to accept half or a quarter of that time as a milestone for disclosure. In fact, the prosecutors' plan is to release the redacted information, if at all, only *during* trial. More than that, the six months are already spoken for. The work we will do before trial will fill volumes. There are ten defendants, 86 counts, seven homicides, and thirty racketeering acts charged. There are 28 primary and more than 67 secondary witnesses. The government wishes to call 23 experts. Time and again, the government has missed deadlines-expert disclosure snafus being the most recent-increasing pressure on the overall schedule. Stage 2 motion practice is upon us now, including *Daubert* hearings. The final pretrial conference will take days, not hours. Special proceedings concerning the jury will be needed. In light of the work before us, it is important for defense teams to begin their potential witness investigations promptly.

The government's refusal to honor the Rule 16 orders is most problematic. The government's professed reason for turning over the many thousands of pages of local police documents was to help defense counsel prepare for trial and for motion practice. By blotting out all identifier information, however, defense counsel still remain in the dark-*and are intended by the government to remain in the dark*-as to the source of the potential evidence. The prosecutors thus want it both ways. They want discovery credit for turning over many thousands of pages. Yet, they want the same pages to be useless in revealing leads.

The orders at issue will mend this disconnect. As well they will maintain, indeed, *improve* civilian witness security. Significantly, during all proceedings leading to the rulings at issue, the government never identified any security

flaw in the proposed protective order.[2] The government never applied any information that any lawyer or investigator on this case cannot be trusted to obey the order. Its sole objection was to the generic concept of any name disclosure whatsoever under any protective order whatsoever, no matter how tightly drawn. The Court, however, worked quite hard to fashion a muscular order, one that will better protect civilian sources than will the status quo. It was not drawn from civil practice, as suggested by the government, but tailored carefully to the specific needs and risks in this criminal prosecution. Given the security built into the protective order, the government's reason for disobeying the orders at issue is not justified.

Of course, it is true that the government has no general duty to provide trial-witness lists and has a limited privilege to keep secret the names of confidential informants under *Rovario v. United States*, 353 U.S. 53, 59 (1957). These lines of authority are inapposite. We are not dealing with confidential informants. We are not dealing with trial-witness lists. No decision cited by the government holds that it has a unilateral right to blot out names of leads in Rule 16 documents. While judges may differ from case to case in the exercise of discretion in fashioning protective orders appropriate to the facts and circumstances, no decision cited by the government even suggests that the orders in question fall outside the discretion conferred by Rule 16.[3]

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[2] In its opposition to this motion, the government has raised for the first time an "unacceptable" feature of the protective order, complaining that potential witness names may be disclosed to the accused 21 days before trial. This is the first time any such supposed concern has been raised by any prosecutor. The government was invited *twice* before to identify any security weaknesses, but elected to remain silent-simply objecting to any protective order at all. For purposes of this motion, the 21-day point is untimely. This ruling, however, is without prejudice to a motion to modify the protective order, as contemplated by the last sentence of the protective order itself.

[3] In this connection, it is disappointing that the government's summaries of decisions have proven to be misleading. Contrary to the government (Br.6), for example, *United States v. Storey*, 956 F.Supp.

Rule 16(d)(2) provides:

> If a party fails to comply with this rule, the court may:
>
> (A) order that party to permit the discovery or inspection; specify its time, place and manner; and prescribe other just terms and conditions;
> (B) grant a continuance;
> (C) prohibit that party from introducing the undisclosed evidence; or
> (D) enter any other order that is just under the circumstances.

In fashioning an appropriate sanction, we must select a sanction that is proportionate to the wrong as well as no more drastic than reasonably necessary to effect the purposes of the Rule 16 discovery at issue; *see generally United States v. Gee*, 695 F.2d 1165, 1169 (9th Cir.1983); *United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir.1987); *Taylor v. Illinois*, 484 U.S. 400, 426-34 (1988). With these criteria in mind, "the appropriate sanction for a failure to comply with a discovery rule should rest in the district judge's sound discretion." *United States v. Valencia*, 656 F.2d 412, 415 (9th Cir.), *cert. denied sub nom. Valencia v. United States*, 454 U.S. 877 (1981), and *sub nom. Duarte v. United States*, 454 U.S. 903 (1981); *United States v. Spillone*, 879 F.2d 514, 522 (9th Cir.1989), *cert. denied sub nom. Citro v. United States*, 498 U.S. 864 (1990), and *sub nom. Spillone v. United States*, 498 U.S. 878 (1990).

934, 939 (D.Kan.1997), did *not* hold that a capital defendant was "not entitled to disclosure of all co-conspirator statements 90 days before trial where safety of inmate witnesses was a real concern." Rather, the government there stated that it had no such statements and the motion was denied on that ground-with the further order to give notice of the existence of such statements should circumstances change, so that the judge could then rule on when a disclosure must be made.

* * *

An objective of the discovery orders at issue was, of course, to provide the Rule 16 material to which the defense was entitled. More than that, however, a key objective was to facilitate trial preparation and thus avoid the cascade of mid-trial and eleventh-hour continuances that would result from the government's unilateral plan to disclose the information, if at all, during trial. The importance of this consideration is paramount, especially in a case of this magnitude (ten defendants, thirty predicate acts, seven homicides and 86 counts). Mid-trial continuances will be most disruptive. They will break up the flow of evidence, inviting mistake, confusion and attempts at repetition of testimony. They will introduce unexpected gaps in the trial schedule, such that jurors' expectations and plans for carrying on with the rest of their lives will be frustrated. They will prolong the trial, creating the danger that jurors will ask to be excused before verdict due to unforeseen delays and hardships-risking mistrials. Mid-trial continuances will force witnesses to stand down. The delay will be propagated down the chain of waiting witnesses.

Continuances on the eve of trial will also be disruptive. Counsel will have blocked out the expected trial dates. They will have built their calendars around it. Trying to slip a trial by even a few weeks will almost always founder on at least one counsel with a firm scheduling conflict. This will lead to a hiatus. Continuances on the eve of trial will also moot all work done via questionnaires in pre-clearing a jury pool for extended service. They will also inconvenience witnesses, especially experts, who have committed their calendars to be available, including hotel and flight reservations and nonrefundable fees.

The prosecution evidently hopes that the Court will refuse such postponements to avoid a "train wreck," as the undersigned has called it. But fairness to both sides may well require trial continuances and mid-trial recesses. To obviate this problem-and to grant access to Rule 16 materials already

owed to the defense-the discovery orders required access to the redacted names of secondary witnesses beginning *now*. For these reasons, a sanction contemplating a program of continuances would defeat the purpose of the Rule 16 discovery orders at issue. The Court might later excuse one or more minor violations curable by a short delay or where a postponement might otherwise occur anyway. But continuances ought not to be viewed by the government as a programmatic cure for its recalcitrance. Doing so would re-introduce the very evil the orders were meant to eliminate.

After careful consideration, this order finds that the most appropriate sanction is to preclude the government from using the testimony of any civilian witness (i) whose name has been redacted from the discoverable materials (ii) against any movant whose defense team has become qualified to receive the redacted information under the protective order and has formally requested access-*unless* the government first demonstrates that, as to that testimony and movant, the refusal to allow access was substantially harmless. The Court anticipates that such proffer-by-proffer rulings may be made while the jury is away from the courthouse, as for example, in the afternoon after the jury has left for the day. The pace of the trial will not be affected. We will try to rule on any given proffer at the final pretrial conference if the government wishes.

Testimony preclusion is the least drastic remedy reasonably consistent with the purposes of the disobeyed orders. Testimony preclusion is also the most fitting remedy in proportion to the wrong. It will allow a witness to testify as to matters unaffected by the violation while excluding those passages prejudiced by the violation. Although preclusion is strong medicine, it is a sanction expressly authorized by Rule 16 and one approved by the Ninth Circuit as within the Court's discretion. *United States v. Burgess*, 791 F.2d 676, 681 (9th Cir.1986). When the ninety-day mark (before trial) passes, the same sanction shall apply as to primary witnesses, assuming the government stands by its

notice of noncompliance.[4]

To implement this sanction, the following procedure shall be used. No civilian witness may be called by the government against any movant unless it first demonstrates that the witness name was unaffected by the redactions. If it was redacted, then the government may still call the witness by demonstrating that the redaction(s) were substantially harmless as to the particular testimony sought to be elicited. In making this showing, the government must, at the time of its proffer, reveal all relevant Rule 16 material to counsel and the Court-*without redactions.* After hearing, an assessment of harm due to the redactions will be made. In evaluating this issue, the following factors shall be considered:

- The importance (or not) of the Rule 16 material with which the redacted witness's name turns out to have been associated;

- Even if the Rule 16 material was important, the extent to which the government seeks to offer testimony unrelated to the Rule 16 material;

- The likelihood (or not) that having timely known the redacted name (but not the locator data) would have materially improved defense counsel's ability to examine the witness;

- The extent to which defense counsel, despite the discovery violation, would normally have been expected to prepare for the testimony through other avenues;

- The extent to which the civilian was in a witness-

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[4] Although the Court has stated that other defense teams need not qualify themselves immediately to receive protected information pursuant to the protective order, it does not follow that other defense teams will be entitled, if they so qualify eventually, to the same preclusion remedy. Depending on *when* they qualify and request access, the period and degree of prejudice may vary.

protection program or otherwise would likely have refused an interview to defense counsel; and

• Any other factor reasonably bearing on harmlessness.

* * *

The government suggests that the appropriate sanction is to bar the death penalty. That sanction would not fit the wrong. The government would be free, under its proposal, to use all testimony of the redacted witnesses during the guilt phase. That would be unfair. And, we would be excluding the possibility of a capital sentence which might be provable and justifiable despite testimony preclusion. The government should remain free to seek the death penalty so long as it can make its case with evidence unbarred by this order. If, however, the record at any penalty phase eventually warrants such a sanction, then it might then (and only then) be adopted.[5]

Death-penalty preclusion is evidently the government's preferred sanction because it would facilitate appellate intervention. To build in error, however, simply to increase the chances of appellate review seems topsy-turvy. In this connection, it must also be said that the Court is convinced that this order (and the related orders) are sound. While the Court has, in the past, invited both sides to seek writs-but to do so promptly-if they disliked various rulings, it has no doubt concerning the rulings at issue. It would be wrong to say to the Ninth Circuit that the undersigned desires interlocutory review.

* * *

With respect to *exculpatory* material, a different remedy is necessary. We must pause here to remind

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[5] The movants desire this sanction but also insist on witness preclusion.

ourselves that, even as to exculpatory matter, the government seeks to blot out the witness identities from all Rule 16 documents (Br. at 7 n. 2). Testimony preclusion would, as to exculpatory material, reward the government for its recalcitrance. That would be perverse. Mid-trial continuances are the remedy preferred by the defense, to be requested once the government, if ever, unveils the names of those who gave exculpatory information to police. For the reasons stated, however, such continuances would undermine the coherenc` of the trial, among many other trial-management negatives. While recesses may prove essential in some instances, the more appropriate sanction, best tailored to the objectives of the discovery orders at issue, will be to deem overruled any government objection to simply reading the exculpatory material to the jury, receiving the read portion in evidence, and instructing the jury that the Court has dispensed with the usual need to subpoena the witness and has allowed this substitute procedure. If, however, the government can demonstrate that a given redaction and corresponding violation are harmless, taking into account factors similar to those listed above, then this sanction will not apply as to that item. This ruling, moreover, is without prejudice to the assertion by the government of Rule 403 or any evidentiary objection other than hearsay and foundation. It is also, of course, without prejudice to any objection made by a co-defendant.

The government must avoid treating this sanction as a substitute for its *Brady* obligations. Put differently, this sanction addresses only its violation of the Rule16 orders. *Brady* imposes its own separate obligation. The government must still honor its *Brady* obligation.[6]

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[6] In this connection, a clarification is in order to correct a misapprehension by government counsel, who have indicated previously that material cannot be exculpatory under *Brady* if it is at least partially inculpatory. This is not so. For example, an eyewitness who cannot place Defendant X at a homicide is exculpatory as to Defendant X even if the eyewitness can place Defendant Y at the scene. An eyewitness who says that Defendant X was only a bystander while Defendant Y actually

The government argues (Br.4):

> In deciding which sanction is appropriate, the Court should consider the following factors: (1) the reasons for the failure to comply with the discovery order including whether or not the government acted in bad faith; (2) the extent of prejudice to the defendant as a result of the violation; and (3) the feasibility of curing the prejudice with a continuance. *United States v. Wicker*, 848 F.2d 1059, 1060 (10th Cir.1988) (citing *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312 (11th Cir.1985)).

Even on these terms, based on out-of-circuit authority, the result is the same. As stated, a program of continuances is not feasible, a central objective being to avoid the massive doses of continuances that would be needed under the government's plan. As for prejudice, it is self-evident. But if a redaction proves harmless, then there will be no penalty. Finally, the reason given for the refusal-witness protection-does not justify its omnibus refusal. *First*, the government refuses even to disclose names of individuals providing *exculpatory* information *(see* Br. at 7 n. 2). *Second*, the protective order will *better* serve witness security than the status quo, for reasons set forth in the memorandum opinion in detail. Sadly, this order finds that the true motive is far less concerned with witness security than with tactical advantage. Despite the Court's considerable respect for government counsel herein, this order must find that they have acted willfully to abridge Rule 16 rights to gain a trial advantage over the defense.

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pulled the trigger is exculpatory as to Defendant X. Testimony that places all defendants at the scene but materially conflicts with the government's theory of what happened is exculpatory. The government should not be making its disclosure decisions based on a crabbed view of *Brady*. These examples, of course, are not all that *Brady* requires.

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In addition, the government's "notice of noncompliance" reaches back almost a year to complain about an order dated August 26, 2005. It states that it will not comply with certain provisions of that order either. The "notice of noncompliance" repeatedly characterizes the earlier order as requiring the government to "provide a witness list 21 days before trial." This is misleading. Actually, the order stated that "[t]he witness list *required by Section 3432* shall also be provided 21 days before trial under the same protective terms" (Order at 11). Section 3432 requires that any defendant facing a possible death penalty be furnished with a witness list "at least three entire days" before trial except that the list need not be furnished if the court finds that doing so may jeopardize the life or safety of any person. Except for the Section 3432 list, the Court has *never* ordered the government to produce a witness list.

Under Section 3432, it is up to the judge, not the prosecutor, to determine when the statutory list will be furnished. The phrase "at least" implies that the judge should set a due date tailored to the needs of the case. *Cf. United States v. Egorov*, 222 F.Supp. 862, 864 (E.D.N.Y.1963) (ten days); *United States v. Willis*, 33 F.R.D. 510, 512 (S.D.N.Y.1963) (at least thirty days). Here, twenty-one days before trial was selected by the Court, given the pace, scope and scale of the case. Since the government has not yet violated the order on this point, however, it is premature to consider any sanction concerning it.

* * *

The government's notice further states that it will not "provide Jencks material 90 days before trial to guarantee that the Court will not grant multiple continuances during trial" (Br.4). The undersigned has been rock solid in enforcing the Jencks Act in this case-over vehement defense protest (see order dated Aug. 26, 2005, at 2-5). The

government may withhold "witness statements" (as defined in 18 U.S.C. 3500(e)) until after the direct testimony of the witness; no order by the undersigned has ever ruled otherwise. As the Jencks Act itself expressly provides, however, this may lead to court-ordered mid-trial continuances, depending on the calculus of fairness at the time (18 U.S.C. 3500(c)).[7]

Seeking to avoid a string of trial continuances, the government suggested early on that it would voluntarily turn over the Jencks Act statements shortly before trial.[8FN8] The Court, however, refused to bless any short fuse, as sought by the government, as a prospective guarantee against mid-trial continuances. If the government wanted a date by which the Court could predict with confidence on a blanket basis that no mid-trial continuances would be necessary, the Court stated that ninety days before trial would do.

If, however, the government elects instead to unilaterally produce a given Jencks Act statement ten or twenty or thirty days or any other period before any given witness testifies, then such lead time might (or might not) prove to be fair as to that particular witness and as to the particular defendants on trial. We will have to assess Jencks Act continuances as events unfold. The Court is disappointed that the government continues to mischaracterize this point. The order dated December 2, 2005, accurately recites the actual ruling.

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In a similar vein, the government's notice states that it will not "disclose non-Jencks *Brady* material 90 days

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[7] To repeat, the witness summaries in the police reports at issue are not Jencks Act statements. *See* 18 U.S.C. 3500(e) *(see* Order dated Aug. 26, 2005, at 5).

[8] Since then, the government has retracted this plan and now says it will disclose only during trial.

before trial" (Br.4-5). Again, to avoid a series of mid-trial disruptions, the government was required to produce such material 90 days before trial if it wished a blanket guarantee against a string of mid-trial continuances. The order, however, recognized that the government has the responsibility in the first instance for determining when the critical point has been reached necessitating disclosure under *Brady*. If it turns out that the government tries to tack too close to the wind, then it will only have itself to blame if its sail collapses due to a series of mid-trial postponements. This, too, is premature as to any appropriate sanction.

CONCLUSION

The government has indicated that it will seek interlocutory review of the rulings in question. If the Ninth Circuit allows review, then a postponement of the trial may be appropriate, depending on the time needed by the Ninth Circuit to decide. Meanwhile, we must all continue to prepare for trial set for January 22, 2007. In that connection, now that the sanction has been determined, the undersigned wishes to give the prosecutors a two-week period to come into compliance. For that reason, the effectiveness of this order shall be **STAYED UNTIL AUGUST 3, 2006,** at noon, after which this preclusion order shall be operative. Please do not ask to extend the deadline.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT,
N.D. CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,

v.

Edgar DIAZ, Rickey Rollins, Don Johnson, Robert Calloway, Dornell Ellis, Emile Fort, Christopher Byes, Paris Ragland, Ronnie Calloway, Allen Calloway, and Redacted Defendants Nos. One & Two, Defendants.

No. CR 05-0167 WHA

June 16, 2006

CONCLUDING ORDER RE LOCAL POLICE REPORTS AND RULE 16 DISCOVERY

WILLIAM ALSUP, J.

The order dated May 18, 2006, held that (i) local San Francisco police investigative reports in the possession, custody or control of the United States Attorney's Office are "documents" within the federal meaning of Rule 16(a)(1)(E) and that (ii) such reports fall within the federal "work-product" exemption from discovery in Rule 16(a)(2) only if the report was prepared in connection with investigating or prosecuting the subject case by police officers having a relationship to the federal prosecutors substantially equivalent to that of federal investigative agents.

The order then gave the government three weeks to prove such a work-product foundation, a deadline later extended to June 13. In response, the government has filed a short statement relying solely on its prior briefing including the *Cherry* case, all of which was rejected in the May 18 order. There being no evidentiary basis for any of the local police reports to be deemed federalized work product, this

order now holds that all of the local police reports related to this case in the possession of the United States Attorney's Office are producible under Rule 16 and are not within the work-product exemption in Rule 16(a)(2).

The May 18 order also gave the government three weeks to show why, in the alternative, any work-product privilege was not waived by its voluntary and intentional disclosure to its adversaries of all but the redacted material. After a further extension, the government submitted a short memorandum relying principally on *United States v. Mann*, 61 F.3d 326, 323 (5th Cir.1995).

Assuming for the sake of argument that the local police reports in question were work product and protected by Rule 16(a)(2), this order holds, in the alternative, that the protection of Rule 16(a)(2) was waived by the government's voluntary and intentional production of the reports to its adversaries herein, at least as to each subject actually disclosed. The substance of the mental impressions recorded in the memos, such as the summaries of witnesses' comments, has been voluntarily revealed. This voluntary disclosure was not pursuant to any confidentiality agreement. It was made to adversaries. Having disclosed so much of the reports and waived so much of the contents, the government may not pick and choose what will be waived on the same subjects.

Disclosure of privileged material waives the privilege as to all material on the same subject. Put differently, selective waivers on a single subject are not permitted. The waiver herein was, therefore, complete as to each subject whose content was partially revealed. Thus, where the substance of a witness comment has been voluntarily revealed by the deliberate production of a report, the government may not unilaterally block out the identity of the witness in the same report. *See United States v. Nobles*, 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); *United States v. Mezzanatto*, 513 U.S. 196, 201, 115 S.Ct. 797, 130

L.Ed.2d 697 (1995); *United States v. Gangi*, 1 F.Supp.2d 256, 263-64 (S.D.N.Y.1998); *Weinstein's Federal Evidence* § 1511.06[2] (2006)..

This is unlike cases where redactions are used to block only privileged matter and the rest of pages are produced as unprivileged. In the present case, the revealed material itself was part of the supposed mental impressions recorded in the memo. The report, if ever privileged at all, was privileged in its entirety; producing a substantial part of it waived the privilege as to the rest of the document on the same subject.

In *Mann*, a case where the prosecutor allowed defense counsel to read agent reports without copying, the Fifth Circuit found that there had been an agreement between counsel that disclosure would be restricted, that no photocopies would be made, and the "[f]rom the start, the defendants agreed to the terms of this restrictive arrangement." *Id.* at 332. When one defendant then breached the agreement, the government terminated all access to the reports. The Fifth Circuit held that the discovery agreement should be enforced and that there had been no waiver of Rule 16(a)(2) protection by reason of the earlier disclosure. Here, in contrast, there never has been any such agreement; rather, there have been uniform protests by the defense as to the redactions. *Mann* is no help in our situation.

With respect to a large subset of all such local police reports, there is an entirely different basis for waiver. The government's earlier expert disclosure stated that its gang expert Tony Chaplin will rely upon local police reports and gang task force reports. Specifically, the expert disclosure stated he would rely on "his review of the material in question," which was footnoted to be:

> Generally, but not exclusively found from bates numbers: JL 00001 through JL 000061; GJ 0001

through GJ 001561; SH 000001 through SH 002993; and supporting audio tapes.

Even the government has conceded that all materials on which the proposed expert witness has relied must be produced. Therefore, any privilege as to the 4500+ pages just referenced would, at all events, be deemed waived.

The foregoing conclusions do not mean that all such redactions must be unredacted now. To the contrary, all of the redactions shall remain in place. Access to the redacted information will be made available solely under the accompanying protective order for witness security.

Nor does it necessarily mean that all other documents obtained from local police by federal prosecutors must be produced. These include rap sheets, a letter from police to the victim's family updating them on the case and others listed in the notice dated June 13, 2006. It is the Court's intention that any and all witness-identifying information shall remain subject to the protective order-even in otherwise discoverable material. A separate briefing schedule will be set to address the list items and their discoverability. This order, for now, addresses only the local police reports already produced (and any other of like kind) already in the custody of the federal prosecutors.

IT IS SO ORDERED.

Federal Rules of Criminal Procedure, Rule 16

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:
(i) any relevant written or recorded statement by the defendant if:
• the statement is within the government's possession, custody, or control; and
• the attorney for the government knows--or through due diligence could know-- that the statement exists;
(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and
(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) Organizational Defendant. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or
(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) Defendant's Prior Record. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows--or through due diligence could know--that the record exists.

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
(i) the item is material to preparing the defense;
(ii) the government intends to use the item in its case-in-chief at trial; or
(iii) the item was obtained from or belongs to the defendant.

(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
(i) the item is within the government's possession, custody, or control;
(ii) the attorney for the government knows--or through due diligence could know--that the item exists; and
(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) Expert witnesses.--At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects,

buildings or places, or copies or portions of any of these items if:
(i) the item is within the defendant's possession, custody, or control; and
(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
(i) the item is within the defendant's possession, custody, or control; and
(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert witnesses.--The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if--
(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or
(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or
(B) a statement made to the defendant, or the defendant's attorney or agent, by:
(i) the defendant;
(ii) a government or defense witness; or
(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:
(1) the evidence or material is subject to discovery or inspection under this rule; and
(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) Failure to Comply. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or
(D) enter any other order that is just under the circumstances.